(23,023)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 947.

THE TEXAS & PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

W. A. HOWELL.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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UNITED STATES OF AMERICA,
Fifth Judicial Circuit:

Pleas and Proceedings Had and Done at a Regular Term of the United States Circuit Court of Appeals for the Fifth Circuit, on the First Monday of November, 1911, at Fort Worth, Texas, and on the Third Monday of November, 1911, at New Orleans, Louisiana, Before the Honorable Don A. Pardee and the Honorable David D. Shelby, Circuit Judges, and the Honorable William I. Grubb, District Judge.

No. 2213.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,

versus

W. A. HOWELL, Defendant in Error.

Be it remembered that heretofore to-wit, on the 6th day of May, 1911, a transcript of the record of the above styled cause from the Circuit Court of the United States for the Eastern District of Texas, was filed in the office of the clerk of said United States Circuit Court of Appeals for the Fifth Circuit, in the words and figures following to-wit:

CAPTION

THE UNITED STATES OF AMERICA.

Eastern District of Texas at the Circuit Court of the United States for the Eastern District of Texas, begun and held at the Court House in the City of Jefferson, Texas, on the 20th day of February, 1911; present, the Honorable Gordon Russell, Judge of the District Court of the Eastern District of Texas; among others, the following proceedings were held:

W. A. HOWELL, plaintiff, VS. THE TEXAS & PACIFIC RAILWAY COMPANY, defendant at law; this cause having been originally filed in the District Court of Harrison County, in the State of Texas, and regularly removed to this Court by The Texas & Pacific Railway Company on the ground of its being a Federal corporation chartered by Congress.

PETITION FOR REMOVAL.

The petition for removal is as follows:

In the District Court of Harrison County, Texas, Judicial District.

W. A. HOWELL

vs. No. 752.

THE TEXAS & PACIFIC RAILWAY COMPANY.

PETITION FOR REMOVAL.

The petition of The Texas & Pacific Railway Company respectfully shows to the court:

FIRST.

That The Texas & Pacific Railway Company was, and is, a corporation, duly organized and existing under and by virtue of the law of the United States, to-wit: "An Act to incorporate The Texas & Pacific Railway Company, and to aid in the construction of its road, and for other purposes." Approved March 3, 1871. and Acts amendatory thereof and supplemental thereto, including an Act approved May 2, 1872, whereby, among other things, the name, style and title of said Texas Pacific Railway Company was changed to "The Texas & Pacific Railway Company."

SECOND.

That the above entitled action was commenced in the above named court on the 27th day of January, 1910, and citation issuing therein was served upon this defendant on the 27th day of January, 1910, which said citation is returnable on the first Monday in February, 1910, it being the 7th day of February, and this defendant is not, and will not be required, by the laws of the State of Texas, or the rule of this court, to answer or plead to the petition of the plaintiff before the 8th day of February, 1910.

THIRD.

That the matter in dispute in this case, exclusive of interest and costs, the sum of value of two thousand dollars, and this suit arises under the laws of the United States as hereinbefore and hereinafter more fully set forth; that this action was brought by the plaintiff for $35,000.00 damages for personal injuries inflicted on him March 3, 1908 in the City of Marshall, Texas, he being an employee of defendant and working under a coal chute and other workmen on top of the coal chute allowed a plank to fall striking plaintiff and injuring him, as appears from plaintiff's petition, which is referred to for a more particular statement of the cause of action.

That this suit against this defendant is a suit arising under the laws of the United States, and more especially under the laws of the United States, constituting the charter of this defendant, and under which it was incorporated, that is to say, the said Act of Congress of the United States, approved March 3, 1871, entitled "An Act to incorporate The Texas Pacific Railway Company, and to aid in the construction of its road and for other purposes," and Acts amendatory thereof and supplemental thereto, approved respectively on May 2, 1872, March 3, 1873, and June 22, 1874.

FOURTH.

That the above entitled action is a civil suit arising under the laws of the United States of which the Circuit Court of the United States for the Eastern District of Texas is given original jurisdiction by Act of Congress approved March 3, 1887, to-wit: An Act entitled "An Act to amend the Act of Congress approved March 3, 1875, entitled 'An Act to determine the jurisdiction of Circuit Courts of the United States, and to regulate the removal of causes from State Courts, and for other purposes,' and the Act of Congress approved August 13, 1878, entitled 'An Act to correct the enrollment of an

Act approved March 3, 1887, entitled 'An Act to amend Sections 1, 2, 3 and 10 of an Act to determine the jurisdiction of Circuit Courts of the United States, and to regulate the removal of causes from the State Courts and for other purposes,' approved March 3, 1875."

Your petitioner herewith presents and files a good and sufficient bond, conditioned that it will enter and file in the Circuit Court of the United States for the Eastern District of Texas, on the first day of its next session, a copy of the record in this action, and for paying all costs that may be awarded by said Circuit Court if said court shall hold that said suit is wrongfully or improperly removed thereto, and to enter special bail in said suit, if special bail was originally requisite therein.

Your petitioner, therefore, prays the said court to accept said petition and bond, and to remove this cause to the Circuit Court of the United States for the Eastern District of Texas, and for such other relief in the premises as may be just and equitable.

THE TEXAS & PACIFIC RAILWAY COMPANY.
By F. H. PRENDERGAST, Attorney.

THE STATE OF TEXAS,
COUNTY OF HARRISON.

F. H. Prendergast, being duly sworn, says that he is the agent of The Texas & Pacific Railway Company, being the attorney of said company; that the said The Texas & Pacific Railway Company is a corporation organized and existing under and by virtue of the laws of the United States; that he has read the foregoing petition and knows the contents thereof; that the facts therein stated are true.

F. H. PRENDERGAST.

Sworn to and subscribed before me, this 5th day of February, 1910.

A. S. CURTIS,
Clerk of the District Court of
Harrison County, Texas.

(L. S.)

Bond for removal was presented to the State Court and accepted and the removal granted.

In the United States Circuit Court for the Eastern District of Texas, Holding Session at Jefferson, Texas.

W. A. HOWELL

vs. No. 568 C. L.

TEXAS & PACIFIC RY. CO.

To the Hon. The Judges of the Said Court:

Your petitioner, W. A. Howell, leave of Court first being had and obtained, files this his amended original petition amending his original petition filed herein on the 27th day of January, 1910, so that the same shall read as follows, to-wit:

Your petitioner, W. A. Howell, who will be styled plaintiff herein, complaining of The Texas & Pacific Railway Company, which will be styled defendant herein, represents and shows that the plaintiff is a resident citizen of Harrison County, Texas, and that the defendant is a body politic and duly incorporated and engaged in the business of a railroad corporation having a line of railroad in Harrison County, Texas, and that the said defendant, Texas & Pacific Railway Company, has and operates its shopes in Marshall, Harrison County, Texas, and has a local agent in Marshall, Harrison County, Texas, towit: Charles Carney.

The plaintiff shows that heretofore, to-wit· on the 3rd day of March, 1908, that he was in the employ of the defendant railway company at Marshall, Texas, as a bridge hand engaged as a day laborer, and at the particular time mentioned he was working under a foreman who was engaged in the work of adding to, remodeling or repairing one of the coal clutes of the defendant railway company in Marshall, Harrison County, Texas. That while he was thus engaged and under the direct orders and instructions of the said foreman, the plaintiff was required to make an excavation and clean out a place for laying a foundation for a portion of the said coal chute, and for the purpose of erecting timbers, etc., and building and erecting thereon portions of said coal chute. While the plaintiff was thus engaged under the direct orders and instructions of the foreman, the said foreman sent certain other employees to the upper portion of the said coal chute and directed them to tear away and remove therefrom certain planks, timbers, etc., that were on that part of the coal chute directly above the plaintiff and over the place where the plaintiff was required to work in excavating a place in which to lay a foundation for said coal chute That the said employees who were sent to that portion of the coal chute over and above

the plaintiff were instructed by the said defendant to tear away from the coal chute certain planks and timbers and in tearing off and removing the planks and timbers that one of the said planks or timbers fell and struck the plaintiff on his head inflicting upon him serious and permanent injuries hereinafter more fully set out.

The plaintiff shows that the said plank or timber struck him on the head, knocked him down, injured and bruised his head and inflicted thereon a serious injury and that the same injured the plaintiff's back and spine, producing a concussion of the brain and of the spinal column and cord and inflicting serious injury to the plaintiff's head and back, which injury has developed into an incurable disease and which injury has totally and permanently disabled the plaintiff. That the said injuries so received by the plaintiff have permanently disabled him and that the said disease of the spine and back and head that has resulted from and because of the sad injuries has totally disabled the said plaintiff and that the said disease is incurable and that the plaintiff will never recover therefrom and will never be able to earn any more money by his labors.

The plaintiff shows that the said injuries were inflicted upon him by reason of the negligence of the defendant railway company in this:

That the said defendant railway company, acting through its foreman and agent, had directed the plaintiff to engage in the particular work that he was engaged in at the particular time and place when he was injured and in the manner in which he was working, and the defendant railway company, acting through its foreman and having full knowledge of the situation of the plaintiff and knowing where the plaintiff was engaged at work, and knowing the dangers attendant thereon, sent other employees up to that portion of the coal chute immediately over and above the said plaintiff and directed the said employees to begin to tear up the floor and tear off certain other portions of the said coal chute, and to tear timbers and plank therefrom and remove the same therefrom by the means of hammers, pinch bars and other tools furnished by the defendant railway company to the said employees, and that the said defendant railway company knew or should have known that it was dangerous to the employees beneath the coal chute and to the employees situated as the plaintiff was situated for the said timbers to be torn away and the said planks to be torn up and removed and that the said defendant knew or should have known by the exercise of ordinary care, that the timbers and planks would probably fall when torn away and

would strike the said employees that were engaged in work below the said timbers, and who were discharging their duties and obeying the orders and commands of the said foreman. That the plaintiff had the right to rely upon the said foreman and did rely upon the said foreman to furnish him a reasonably safe place in which to work and in not exposing him to unnecessary risks and dangers and that the plaintiff had no knowledge of the dangers to which he was being subjected, and assumed that the foreman would take proper precautions to protect him from injury and would not subject him to injuries.

That the said injuries were inflicted upon the said plaintiff by reason of the said negligence of the said defendant railway company and its foreman and without fault of the plaintiff.

The plaintiff shows that he received the injuries herein complained of by reason of the negligence of the said defendant in this: That while he was engaged in the work of excavating and arranging and making a place to lay the foundation for the timbers for a portion of the said coal chute under the orders and directions of the said defendant railway company as herein set out. that the said defendant railway company caused and permitted other employees to engage in work over, above and near the said plaintiff in such manner as that the said work and the way in which it was being performed caused a certain piece of timber to fall upon the plaintiff and inflict upon his head the injury hereinbefore set out.

The plaintiff shows that the defendant knew of plaintiff's situation and was guilty of negligence in permitting and causing the other employees to engage in the work upon that portion of the coal chute over, above and near the said plaintiff in such manner and way as to cause the said timber to fall upon and injure the said plaintiff; and said defendant was guilty of negligence in failing to make or cause to be made a proper inspection of the said coal chute and premises to ascertain that there would be no danger of timbers falling upon the said plaintiff by allowing or causing other employees to engage in work upon other and different portions of the said coal chute over, above and near the said place where the plaintiff was engaged in the work which he had been directed to do by the said railway company.

That by reason of the said negligence of the said railway company as herein set out the plaintiff received the injuries herein complained of.

Plaintiff shows that at the time he was injured he was a young man, able to do much work, and was earning the sum

of $2.25 per day and was about forty years of age and that by reason of the said injuries that the said plaintiff has been totally incapacitated from engaging in any labor whatever or earning any money and is a total invalid and will never be able to earn any more money

That by reason of the said injuries the plaintiff has had to expend large sums of money for doctors' bills and medicine; has suffered great and excruciating physical and mental pains and will continue to so suffer so long as he may live.

That by reason of the said injuries which were inflicted by reason of the said negligence of the said defendant the plaintiff has been damaged in time lost—time he will lose in the future; by reason of his life being shortened, mental and physical suffering endured and that will be endured in the future in the sum of, to-wit: thirty-five thousand dollars.

Wherefore, the premises considered, the plaintiff sues and prays that upon final hearing he have judgment against the defendant for thirty-five thousand dollars actual damages, for all costs of suit, and for general relief.

JONES & BIBB,
Attorneys for Plaintiff.

In the United States Circuit Court at Jefferson, Texas.

W. A. HOWELL
vs
TEXAS & PACIFIC RAILWAY COMPANY.

FIRST.

Now comes the defendant and demurs to plaintiff's petition and says same is insufficient in law and of this prays the judgment of the Court.

SECOND.

And for answer defendant denies each and every allegation in plaintiff's petition and says it is not guilty of the wrongs charged against it and of this puts itself upon the country.

THIRD.

Specially answering this defendant says, that the plaintiff, W. A. Howell, was at work on the ground under the coal chute of the defendant company in the City of Marshall, excavating a place for an upright post to be placed in repairing said coal chute and while there at work in removing the old

post a small piece of timber or plank about 2 inches wide and 2 feet long was dislodged from some of the upper decking on the coal chute and fell and struck Howell on the head, causing a cut in the scalp from which he recovered in about one week; that the piece of plank was caused to fall by the workmen moving the upright post preparatory to replacing it with a new one.

FOURTH.

Plaintiff asserts that some of the workmen repairing the coal chute were on the upper deck of the coal chute removing the floor up there and, in doing so, caused the piece of plank to fall. In answer to this the defendant says that the workmen on the upper deck were the fellow servants of the plaintiff, W. A. Howell, and that he can not recover for any of their negligence.

FIFTH.

Defendant further says that the workmen on the upper deck were exercising due care in removing the defective pieces of plank from the coal chute and were not guilty of any negligence in causing the piece of timber to fall.

SIXTH.

Defendant further says plaintiff and his fellow workmen were sent there to repair the coal chute. that it became defective by reason of time, and that it was their special duty to remove the old pieces of timber and replace the same with new pieces of timber; the plaintiff knew the character of work that they were sent to do; he knew the men were at work on the floor above where he was at work; and he knew what they were doing there; that he therefore assumed the risk of being injured by reason of the piece of timber falling on him. He therefore can not recover.

SEVENTH.

This defendant further says that the plaintiff apparently is now suffering from a disease called Potts' Disease, which is frequently called Tuberculosis of the Spinal Column, and plaintiff says that said disease was brought on by the injuries he received. Defendant denies this and says that if it is true, it is not liable for said secondary result of said injuries, but that the cause of the present disease is that his system was impregnated or infected with tuberculous germs before he received any injury, or that he was so infected without reference

to the injury; that said present malady with which the plaintiff is suffering developed in his person more than 12 months after he received said injury and is not in law the direct, or approximate, or natural, nor reasonable, result of the injuries he received.

Wherefore he can not recover.

F. H. PRENDERCAST,
Attorney for Defendant.

———o———

W. A. HOWELL
vs.
TEXAS & PACIFIC RY. CO.

In U. S. Circuit Court for the Eastern District of Texas.

Now comes plaintiff, W. A. Howell, leave of Court being first had and obtained, and files this his first supplemental petition.

Replying to defendant's answer herein, the plaintiff shows that if the men who were working over, above or near him and who caused the piece of plank or timber to fall upon and injure plaintiff were negligent, that such negligence was not the proximate cause of the injury; but that the negligence of defendant in failing to furnish plaintiff a safe place in which to work, or in making the place unsafe after plaintiff began to work by sending the men above him, or directing the floor and timbers to be removed in the manner and under the circumstances was the proximate cause of the injury, and if the negligence of the men engaged in the said work had any share or part in causing the injury, that it merely contributed thereto and plaintiff is entitled to recover.

Wherefore, plaintiff prays for judgment as in his amended petition.

S. P. JONES.
Attorney for Plaintiff.

Plaintiff's first supplemental petition, filed February 25, 1911, by J. R. Blades, Deputy.

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JUDGMENT.

W. A. HOWELL
vs. No. 568.
TEXAS & PACIFIC RAILWAY COMPANY.

On this the 25th day of February, 1911, came on to (be) heard the above cause and both parties plaintiff and defendant announced ready for trial and thereupon came a jury of good

and lawful men, to-wit: J. F. Crow, foreman, and eleven others, who after being duly empaneled and sworn and after hearing all evidence and argument of counsel and having received the charge of the Court, retired to consider of their verdict and after having duly considered the same returned in open court on the 28th day of February, 1911, the following verdict: We, the jury, find for the plaintiff the sum of eight thousand dollars.—J. F. Crow, foreman.

It is, therefore, adjudged, decided and decreed by the Court The first reduction in the force was about the 25th of March, that the plaintiff, W. A. Howell, have and recover of and from the defendant, The Texas & Pacific Railway Company, the sum of eight thousand dollars and all costs of suit, and that this judgment bear interest from this date at 6 per cent per annum.

Further ordered that plaintiff for the use and benefit of the officers of the Court recover of the defendant, Texas & Pacific Railway Company, all costs of this suit.

Filed February 28, 1911. C. C. BUMPAS, Clerk.

———o———

ORDER EXTENDING TIME.

W. A. HOWELL

vs.

TEXAS & PACIFIC RAILWAY COMPANY.

In U. S. Court at Jefferson, Texas,

In the above case a verdict has been returned for the plaintiff for $8,000.00.

It is ordered by the Court that execution be stayed for 42 days to allow the defendant time to prepare and present a motion for a new trial and the cause is kept open for the purpose of hearing motion for a new trial and settling bills of exceptions for a writ of error.

GORDON RUSSELL,

February 28, 1911. Judge.

Filed February 28, 1911. C. C. BUMPAS, Clerk.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS, AT JEFFERSON.

W. A. HOWELL

vs.

TEXAS & PACIFIC RAILWAY COMPANY.

C. L. No. 568

On the trial of the above entitled and numbered cause, in the Circuit Court of the United States for the Eastern District of Texas, at Jefferson, the Honorable Gordon Russell, District Judge presiding, on the 25th and 27th days of February, 1911, the following evidence was introduced, proceedings had and exceptions reserved, to-wit:

W. A. HOWELL, the plaintiff, testified:

I now live in the country near Mansfield, Louisiana, and have lived there the last time since May, 1909. I was raised there, but have been away some in the last few years. My father's name is Henry Howell, and he lives near Mansfield, Louisiana. My father and mother are both living. My father is 75 or 76 years of age, and my mother about 65, I think. My father's health since I can remember has been good, and my mother's health has always been good. I am 44 years of age. I have five brothers and five sisters living, and two dead. The family consisted of twelve children, and all are now living but two. My two sisters who are dead died with flux. I was injured in 1908. I am married. Prior to my injury I had never had rheumatism or neuralgia. My health was good prior to my injury. I have never had any venerial disease. I have never prior to my injury had a severe cough. My father and mother and none of my family have never suffered with a severe cough or anything that indicated consumption or anything or the kind. Neither my father nor mother ever suffered from rheumatism, except that years ago my father had rheumatism some. It was in his legs and it was thought he contracted it during his service in the Civil War. None of my brother and none of my sisters ever had any kind of lung trouble. Their general health has been good as far as I know. None of my kin people have ever had consumption. My wife is a healthy woman and has never had a cough or consumption. I have four children and none of them have ever had a cough or anything that indicated consumption. None of them have ever suffered with any bone disease or rheumatism. They have always been

in good health. I was raised on a farm and have been a farmer the most of my life. I was an actual farmer and not an agriculturalist. I did not simply run a farm, but did the actual manual labor myself. I was injured March 3, 1908, and had been working for the defendant since August 16, 1907. Mr. Dave Woodruff was my foreman and we had a scratch boss, who is a boss under the foreman, and a man he selects to have certain work carried out at times. Mr. Brewer and Mr. Jackson were scratch bosses, and Mr. Cully sometimes served as a scratch boss. He would take some of the men and go do certain work at times under the direction of the foreman. I know Mr. Cully sometimes was sent off with men to do work by Mr. Woodruff and he might have been a scratch boss. Mr. Woodruff is the man who hired me and he had the power to discharge me. He had complete supervision and control of the gang in which I worked. I believe there were something like 18 men in the gang at the time I was injured. I was hurt early in the morning and I think about eight or nine o'clock. I was shoveling dirt under the coal chute at Marshall at the time I was hurt. Mr. Woodruff put me under there and told me to frame a hole in the ground in which to set a timber. I was to cut a square hole in the ground in which to set a timber. I was engaged in doing that work under his instructions at the time. One of the Harper boys and I think Clarence Bennett were near me at the time I was hurt. At the time I was hurt my body was in a stooping position, and I was shoveling dirt. I do not know what hurt me, but was informed it was a piece of timber. The timber struck me on the head. I was in a position with my head about on a level with my body. The blow was about three-quarters of an inch to the front of the curl in my hair on top of my head. The scar is there to show. I was knocked down and dazed by the blow. I got up and fell again and again got up and would have fallen the third time had not some one caught me. The blow knocked me right straight down to my hands and knees. The blow cut a gash in my head about an inch and a half long, and I presume it cut to the bone. After I was hurt one of the boys carried me to the bridge house and the ambulance came for me and took me to the hospital. Mr. Woodruff was the general foreman of the gang in which I worked, and he directed me to do the working I was doing at the time I was hurt. It was my duty to do what he told me to do. He planned and directed the work for the gang. I lived on Burleson Street in Marshall at that time. I did not remain at the hospital for treatment. I went

home. The wound on my head was dressed at the hospital, and then I went home. I went back to the hospital for treatment the next morning, and then I continued to go back for six or eight days. The wound on my head healed up. When it was inflicted it dazed and hurt me. The evening after I was hurt and about sundown my neck became stiff, and I had pain in my neck that afternoon, and the next morning the hurting was down between my shoulders, and in my neck as well. That hurting in my back remained all the time, and it worked up and down my back, up and down the spinal column. It would sometimes get down below my shoulder blades and into the small of my back. The pain seemed to work up and down the backbone, and would hurt down as low as even with my hip pocket. It continued that way for about a week after I was hurt. Sometimes the pain was very severe and at other time not so bad. At times it would just be a kind of ache. I have never been entirely clear of pain since the day I was hurt. I went back to work in eight or ten days after I was injured, and I remained with the gang something like two months, and during that time I was still having the pain in my back that I have testified about. At the expiration of about two months there was a cut in the force and I was let out. When I was let out of the bridge gang I went back to Marshall, and I got work in Marshall cutting joints in the sidewalk. When the walks were built they did not leave any expansion joints and I was employed to cut them. I worked at that employment for the city eight days, I think. I then asked for a job watching on the streets and they gave it to me. It was a light job and I wanted it because I could not do heavy work at the time, and the reason I could not do heavy work was on account of the fact that I was suffering with my back. I continued as a watchman until some time in August and quit because I got sick. I was sick with the hurting in my back and fever. I suppose I was in bed something like a week, and about the 2nd of September I went to work in the round-house of the defendant at Marshall as a wiper, which was light work. I worked at that occupation until about the middle or last of December. At times I was sick and did not work all the time. I was suffering with my back. During the last part of October or the first of November I got down with my back, and remained confined to the house about a month. I had pains in my back and side and this is what caused me to go to bed. The pains were in my back and left side over the ribs and backbone.

About half of my left side to the left of my backbone hurt me just under the short ribs. After being down about four weeks I went back to work at the round-house. I worked off and on. Some days I would be off because I was down with pains in my back, and was not able to work. I quit the job at the round-house the 30th of December, 1908. Up to this time my testimony has covered the period from March 3, 1908, to December 30, 1908. I gave up my position at the round-house because I was unable to work. I left Marshall on December 30, 1908, and went to Colorado City, in Mitchell County, Texas. My brother was out there. I took my family with me. My brother was living on a farm near Colorado City, and I went to his home. I got there on the morning of the 31st of December. I rented a farm about three miles from Colorado City, and about three-quarters of a mile from where my brother lived, and on the place of Geo. Shurtleiff. I rented the land January 1st, 1909. I broke some of the land and cut kaffir corn and milo maize stalks and I also cut some cotton stalks. That was all done with a stalk cutter. My back was hurting me all this time. I rode on the stalk cutter. Sometimes riding on the stalk cutter hurt so badily I would have to get down and walk. The cutter would jostle and jump over the rough ground and that hurt me so I could not stand it; it hurt my back and left side. It hurt right on the backbone about half way down my back. I cut the stalks and broke the land in January and February. I went to see Dr. Phenix in Colorado City; my brother carried me there in a buggy. That was two or three days after I got to Colorado City. I went to see him because I had to have something done for my back, and wanted relief. Dr. Phenix gave me some capsules and I took them according to his directions. My back did not get well, and I don't remember ever going back to Dr. Phenix any more, and I did not send to him for medicine. About the last of February or the first of March Dr. Smith came to see me. I was down in bed sick and sent for him. I remained in bed about a month at that time, and suffered continuously with my back and side. That is what kept me in bed, the suffering and pain, and I had fever also. I got up and was able to knock around, but I could not work. I continued to be up and around the place through April, and all the work I did was to get up one or two little loads of wood. I never got so I could work after that spell. I left there in May and went to my home near Mansfield, Louisiana, and have lived there since that time. I live five miles southeast of Mansfield. My father

has lived there since he was a young man after he married. I do not think I put in a month's work during the entire time I was at Colorado City. I could not work all the time, and worked all I could. After going to Mansfield I went to see Dr. Stokes. I had known Dr. Stokes a long time; he came there when he was a young man and he had passed middle age when he treated me. I went to him to get something done for my back. He did not give me any midicine, but treated my back with electricity. I went to him for treatment some four or five times. The last time I saw him was towards the latter part of May. The next doctor I saw was Dr. H. J. Parsons at Mansfield, but I can not remember the date I first saw him, but I think it was some time in June. The electric treatment Dr. Stokes gave me did me no good whatever. From the time I was hurt up to the time I saw Dr. Parsons my back would be better at times and worse at times. Sometimes I would have pains in my back and at other times there would be no pains, but there was a kind of soreness there all the time. Dr. Parsons has treated me all the time since I first saw him up to the present time. Dr. Stokes is dead. My back was in good condition before it was hurt. I am now stooped over and can not stand erect. Most men who labor are a little stoop-shouldered, but before I was hurt I carried myself as erect as the average man. My body began to curve forward about May, 1909, and the curvature or bending of my back has gradually grown worse since that time. A knuckle has formed on my backbone; it is about half way between where the hair ends on the back of my neck to the lower end of my backbone. There is an abscess on my wrist which came there in March, 1910. I have another abscess on my left leg just above the ankle and on the outside of my leg. That started in March, 1910, and is a running sore or abscess. I have another abscess on my right leg near the groin. It is a very large one, what is known as a cold abscess, and has never discharged any yet. About the last of March, 1910, I began coughing and expectorating and that has continued up to the present time, and what I spit up looked like discharge from an abscess. I also coughed up some small pieces of bone. I have those small particles of bone in my pocket—that is a portion of them. Some of them are white and some black. The black ones were coughed up first. Some of them were as large as a half grain of rice. I have suffered greatly, suffered death. The very severe pains I suffer sometimes last a day or two at a time. At all times when I have been in bed and in the house the pains have been

severe. The pains have been in my back and side. After I was hurt one of the bridge men said I was struck by a piece of timber that came from above—that is, from the deck of the coal chute.

Cross-examination:

A coal chute is a frame work elevated some distance above the surface of the ground, and has in it pockets from which coal is dumped into the engines. There is an incline plane for the engines to go up. I suppose the upper floor of the coal chute was some 12 or 14 feet above where I was working. It slopes up, and the further you go towards the other end the lower it is. Mr. Tom Brewer came along and said to Louis to get a pinch bar and top maul and go up on the chute. I do not know whether any of Woodruff's men were above me or not. I remember that one of the Harper boys and a fellow named Dahnke were under the chute with me I don't know where Bennett is now. Harper is here. I think John is the one that was there. I was hurt the third of March and went directly to the hospital and had my wound dressed, and went from there to my home. I only remained at the hospital that day long enough for them to dress my wound. I live on East Burleson Street and the hospital is on West Burleson Street, about a mile from my home. I went back to the hospital the next morning. I walked from my home to the hospital once a day and had my wound dressed and then would walk back home again. I went back to work for Mr. Woodruff some eight or ten days after I was hurt. During the financial panic there was a cut in the force, and I was let out. but I was not let out at that time. It was May that I was cut out. I did not go to work for the city about the 28th of March. My being let out had nothing to do with the injury I received. A number of men all along the road were let out at the same time I was. I suppose a week or two after I was let out I went to work for the city, and the work I did was cutting expansion joints in the pavement. The trenches were cut three-quarters of an inch wide and about fifty feet apart for the purpose of permitting the walks to expand. I cut with what is known as a rock-chisel, and used a little box to sit on. I worked at that a few weeks, two or three I presume. The next work I did was watching to keep any one from walking on new pavement before it got dry. I worked under a man named Kelly and had that job until some time in the latter part of August. About the 1st of September I went to work for the defendant as an engine

wiper. I wiped the engines off and cleaned them with waste. I had nothing to do with cleaning the fire and cinders out of the engines. There were six wipers. The memorandum from which you read stating that I went to work at the round-house on the 2nd of September, 1908, and worked until the 14th, and then laid off until the 6th of October, and worked every day until the 28th of October, losing three hours, and was then off all of November, 1908, and until the 4th of December, and worked from the 4th until the 20th of December, and got a time check on the 28th of December, 1908, is substantially correct and about represents the time I worked. I did not work all the time. Dr. Raines waited on me at Marshall in November, 1908, and I was confined to my bed for a month and in the house above five weeks. He came one night to see me and afterwards prescribed for me. I reached Mitchell County December 31, and two days after I got there I went to see Dr. Phenix. My recollection is that he saw me but once, but he may have seen me twice. He did not come to see me at all. I saw him in town. In February, 1909, I did not have a physician. In March Dr. Smith treated me for malaria and for the pain in my back. I don't know how many times he came out to see me. I did not have a physician to see me in April, 1909. I went to Mansfield about the 10th or 15th of May, and saw Dr. Stokes in June. I went to see Dr. Stokes four or five times. He had some kind of electric battery he applied to me. I first saw Dr. Parsons some time in August. Dr. Parsons had been treating me over a year when my deposition was taken on September 8, 1910. Since August, 1909, I have been going to see Dr. Parsons every week or two or three weeks along. About September, 1909, I concluded that I would make claim against the railroad for injuring me. I concluded the railroad was responsible for my condition because I had been suffering with my back all long from the time I got the lick on my head and I thought that was the cause of it. If I told any of the other doctors about the lick on my head before I saw Dr. Stokes, I do not remember anything about it. I may have told them. The brace I now have on is the same one I was wearing when the doctors examined me at Dallas.

Redirect examination:

I can not stand straight even with the brace on me. The way I walk, that is to say, in a stooping position, is the most comfortable way for me to be. Dr. Smith did not examine me, but gave me some medicine for malaria. I complained

to him of my back. I do not remember whether he took my temperature, but he did not take any of my blood to examine. Had not had a chill when he came to see me. I thought all the time the lick on my head was the caues of my trouble, but I thought I would get well, and that is the reason I made no claim against the railroad until the fall of 1909. Dr. Moore treated me at the hospital and he gave me a liniment for my back. He said he thought the trouble in my back was muscular rheumatism. I was in Dallas in the fall of last year and was examined by three physicians whose names I do not know. I was in a stooping position and shoveling dirt at the time I was injured. The doctor did not take in stitches in the wound in my head. He said he thought I would get all right without that. The doctor did not say the skull was fractured. He did not examine for that. The scar is on my head where I was struck.

DR. H. J. PARSONS testified for plaintiff:

Live at Mansfield, La. Was born and raised there, and have been there some 36 years. I am a practicing physician and surgeon of the regular school of medicine and a graduate of Tulane University. Have been engaged in the practice 16 or 17 years. I know plaintiff and have known the family 15 years. Have been their family physician at least 10 years. Heard plaintiff's testimony. First saw him about July, 1909. He then complained of his back hurting him. Have been his physician since that time. I have watched the progress of his disease. The third visit I made to him, which was six weeks after the first visit, I discovered the curvature in his spine. It was very small at that time. His trouble is what is known among physicians as Potts' disease or tuberculosis of the spine. It takes its name from the first physician who first accurately described the condition. It is known as one of the surgical diseases. The plaintiff's disease since he first came under my observation has been progressive, gradually growing worse. I have seen the plaintiff once or twice a month every month since I first discovered the knuckle in his back, and while I could not give definitely the time in which the various changes in the size of the deformity have taken place, still I could say that about every four months I could detect that it was getting worse, and that the place gradually involved more of the vertebræ or separate pieces of the backbone, until at the present time it seems to involve several of the pieces of the backbone. I think it was in the spring of last year that I first detected an enlargement in his groin, what we doctors call a psosas abscess. It takes its

name from the location and the direction that the abscess follows down the psosas muscle, and it is nearly alweays distinguished by some collection of pus. That abscess has acquired quite a large size. I should say it has a pint or more or blood and matter in it; that would be my estimate. At the same time, the general health of Mr. Howell has been fairly satisfactory, but I take it that the change in the plan of his living is responsible for that. He has adopted an outdoor life and sleeps outdoors, which has a good effect on his general condition, but no affect on the general condition of the local disease in his backbone. About the latter part of August or the 1st of September, Mr. Howell had a slight hemorrhage from his lungs, and within a couple of weeks after that he began to cough up pieces of bone. Now, that bone was evidently thrown off from the diseases of the back, and the bones had wroked through the pleural cavity, and through the lung, and was coughed out through the bronchial tube. He has occasionally from that time coughed up pieces of bone. The psosas abscess has its origin, in my judgment, from the tubercular disease of the backbone. It forms at the diseased part of the backbone and traces down to the groin. That is a usual condition in Potts' disease of the spine; in trouble of that character an abscess will usually form in the groin. Just at this time I can not say that plaintiff has any other abscess, but he has had two other abscesses which are liable to break out again. They are not directly traceable to the disease, but the abscess in the groin is. Mr. Howell had told me that about the time he began to cough up the particles of bone and when he had a hemorrhage and was coughing and vomiting that he had quite a free discharge of pus which came out through his mouth. If that be true, I take it to be due to some obstruction of the secretions—that is some obstruction of the route the disease of the spine has followed. I think an accumulation took place around the diseased focus, and that it broke through the lung and was expectorated in that way; that it was pus from the same source and simply selected or followed another route or branch. Same the time of its formation the abscess in the groin does not seem to enlarge; it is now about the same. In the plaintiff's case, the part of the vertebra which lies in front of the cavity of the spinal column is affected, and as it continued it has resulted in the breaking down of the body of the vertebra itself, that is the bony substance on the outside. The vertebræ is formed by one bone on top of another, and the erectness and symmetery of the spine depends on the vertebræ

being in line. the bones resting one upon the other. Now, in the plaintiff's case, there was a destruction on the inside of the column which naturally caused the protrubrance back there and caused the inside of the column to drop down. which accounts for the position the plaintiff assumes in his walk. In other words, one joint of the backbone is practically destroyed, due, as I have explained, to the working of the disease and the destruction on the inside of the vertebra. The plaintiff has been physically unable to engage in any kind of work since the first time I saw him and can not work at this time. I do not believe he will ever be cured. The disease from which plaintiff is suffering is plainful—in fact, it is associated by constant pain. In this disease we have constant complaint of pain in the back. There is no way of accurately diagnosing the disease until the breaking down occurs unless it could be diagnosed by the use of the X-Ray. The pains from which one suffering from Potts' disease complains are similar to those found in lumbago and muscular rheumatism. I practice medicine in a country where we have malaria. There is a way to tell when a patient has malaria, and that is by a microscopic examination of the blood, and this test is absolutely accurate. Potts' disease of the spine is not usually accompanied with fever. We may have Potts' disease in children from an hereditary tendency. Children are very susceptible to bone and joint diseases, especially children who live in the cities, and then children without the hereditary tendencies, but with weak constitutions have an inclination to develop the disease. Traumatism, as we call it, is the most frequent cause of the start of the disease, and by that I mean some physical injury. Taking the plaintiff's case as I have heard it detailed on the stand, and the history of his family, father, mother, brothers and sisters, and the history as given of his own individual family and of his own personal life, and the fact that he was injured as he has described by receiving the blow on his head sufficient to knock him down, and that the pains in his back have continued since the time of his injury, I believe the blow he received on the head is the cause and start of the trouble from which he is now suffering. I believe there must be three or more of the joints of the backbone now involved. Tuberculosis of the spine is a germ disease. The germ is apt to attack any part of the body. It would usually attack the lungs, of course, since tuberculosis of the lungs is most frequent, and where it attacks a certain portion of the human body, we usually attribute the attack to that part as due to some lack of resistence of the tissue

forming the part; in other words, there must be a weakness or decreased resistance of the particular part attacked. The plaintiff has no lung consumption or tuberculosis. I might modify that statement somewhat by saying he has no lesion in his lungs that could be ordinarily detected by a physical examination. I have no doubt that his lungs will become affected through the tract through which he has been coughing up particles of bone and other tuberculous matter from the condition of the spine. It would be natural to expect that the lungs would become involved from the conditions now existing. I examined plaintiff yesterday in company with Dr. Terhune and Dr. Phenix, and Dr. Mosely was also present. Very frequently a man in normal condition is able to throw off the tubercular bacillus without becoming infected. It frequently happens that we have a local tubercular infection—that is, the germs are present, and the patient will recover perfectly, if there is no decreased vitalitly or anything to cause it to set up a nest and go to work. It seems to me that the blow to the plaintiff's head could have produced his condition from the fact that the backbone is jointed continuously with the skull, and the force of the blow was transmitted down the vertebral column from the head. The backbone is articulated closely with the skull, and the force of the blow would be transmitted down the back. The force of the blow could be carried down the bony substance of the back. In other words, if you hit one end of a stick, the force or jar of the blow would be felt at the other end.

Cross-examination:

The force I speak of would be when he was standing up and was struck on top of the head, and the same jar would be produced to his spinal column. If he was stooping over with his body inclined and his head as low as his back, there might have been transmitted to his spine some force. You may inflict a blow on the body and it may produce effects at once, and, on the other hand, the effects may come some time afterwards. You may strike one side of the head and injure the other side. When a blow is inflicted and an injury or bad condition sets up at another place some time afterwards, there must be some injury at the time of the blow, but the results may not be apparent for some time. Spondylitis is Potts' sdisease of the spine, and it refers to an anterior or posterior curvature of the spine. It is only another name for Potts' disease of the spine. As to whether Potts' disease could be produced by an injury, unless the tubercular bacillus was in the system at the time of the inflicetion of the injury

is a question in my mind. I am not prepared to say whether it would or would not in a case like this. There is such a thing as the germs of consumption existing in the system in a harmless condition until something like a blow develops or brings them into activity. An injury to a person will produce Potts' disease by resason of the fact of the condition of the person receiving the blow, when it would not produce it in a person in more perfect condition. I do not think Potts' disease is ever produced in the system by the direct infliction of a blow—that is, by tubercular infection being taken into the open wound. A bruise is more apt to develop Potts' disease than a cut, and it might develop in any part of the system. It usually attacks the joints or spine, but it can develop in any part of the bone. My information of the pathology and course of Potts' disease is mainly from my learning out of the books. and studying what others have seen. In this instance plaintiff has coughed up pieces of bone. I never knew this condition to exist before, and I have never read of such a case. There is not room for my being mistaken about it being done. I account for it by the fact that the particles of bone have found their way from the backbone to the lungs. Plaintiff described the matter to me by saying he vomited and coughed up the bones. When a person has hemorrhages from the lungs they will frequently vomit as much as they cough. The blood he vomits up comes from the stomach because it has been swallowed into the stomach. The bone could have come from the stomach from something he had eaten, but I do not believe it was bone he had swallowed. The psosas abscess is a cold abscess. I do not think that abscess ought to be opened. It is easy enough to open them, but if you want to stop them from running, you can not do it. I believe if it was opened the whole tract would become infected with other germs and his general condition would be worse than it is at present. I believe to open it up would have a more deleterious influence on his health than to leave the psosas abscess as it is. The fact that there is no inflammation leads to the conclusion that it is not deleterious. I do not think it is the history of Potts' disease that rarely more than one joint of the backbone is affected. I did not make a diagnosis of the plaintiff's disease the first visit I made to him which was in July, 1909. I think I first gave the plaintiff some galvanism about the back, applied an electric current. I became convinced that it was Potts' disease about six weeks after I first examined him, and on his third visit to me. I then found a little knuckle or deformity in his back. It is

hard to account for the way tubercular bacillus gets into the human system. There is hardly a railroad passenger car that does not contain thousands of the germs. They are everywhere. It is easy enough to get the infection in the system. The germs pass into the system through the lymphatic circulation, and more often they pass out of the system of a healthy, uninjured person without doing any harm. Bradford and Lovett say that 53 per cent of Potts' disease is produced by an injury; that that per cent can be traced directly to traumatism. I know of the work of Dr. Allen McLean Hamilton, Clynical Professor of Medical Diseases in Cornell Medical College. His statement that the germs of tuberculosis may be latent in the system and brought into activity by a bruise or cut I understand to be the correct teaching on the subject. The germs take hold in the body on account of the bruised condition ,but they may have come into the system through eating and drinking and breathing contaminated air. I do not know in extreme cases how long after an injury Potts' disease will develop. Tuberculosis of the spine is essentially a chronic process, but certainly it would have to set up in some reasonable length of time after the injury, usually within from thirty to ninety days, but the disease might have been there for a year and four months and the physicians treating the patient failed to discover what it was or make a correct diagnosis. It might be a good long while before a complete disintegration of one of the vertebræ would take place so that it would be easily discoverable. When the disintegration on the inside of the backbone takes place, there will be formed a knuckle and the body of the patient will incline forward. Sixteen months after the infliction of the injury is quite a long time for it to take for the knuckle to form.

Redirect examination:

I do not remember in my readings to have come across a statement as to the exact time necessary after the infliction of the injury for the knuckle to form. My statement is that the germs may be in the system and do no harm to the individual, but if there is an injury this may form a nest in which they work and cause Potts' disease. If the plaintiff received the injury as he stated, and from shortly after the time of its infliction he has complained of pains in his back, such pains, in my judgment, would indicate an injury to the back, and the fact that Potts' disease had set up there then, but of course there is no way in which it could be accurately

and definitely diagnosed until the knuckle appeared. I do not know that the plaintiff has any infection of the lungs.

Recross examination:

What I mean to say is that he has no lesion or point of tubercular infection in the lungs that I could demonstrate by a physical examination. I do not say he has none, because he has been coughing, and there may be infection around the tract, but it is not sufficient to detect by an ordinary physical examination. The bones could not have gotten into the lungs without passing through the pleura, which is the sack that holds the lungs. The outer portion of the backbone is harder than the inner portion, and therefore not so easily dissolved, and I account for the particles of bone coming out from the fact that the disease has caused particles to sluff off and not being dissolved, they have made a tract or opening from the back through the pleura and into the lung and come out through the mouth in that way. I account for it by the anatomical fact that the outer casing of the bone is hardest.

Dr. A. A. Terhune testified for plaintiff:

I reside at Jefferson. Know the plaintiff and Drs. Moseley, Parsons and Phenix. I was present at Dr. Moseley's office when Mr. Howell was examined by the gentlemen named and assisted in the examination. We diagnose the trouble of plaintiff as Potts' disease of the spine. Heard the plaintiff detail the history of his condition when he was on the witness stand this morning. From the history of the case, I would attribute plaintiff's present condition to the lick he received on the head. Plaintiff is now an invalid and unable to engage in any character of manual labor, and never will be. My prognosis of his case is very unfavorable I do not believe he will ever get well. Am a graduate of Jefferson College of Philadelphia, and had 20 months' hospital experience. The authorites give 53 per cent of the cases of Potts' disease as being caused by traumatism or injury. I agree with Dr. Parsons in his theory of the plaintiff's disease which I heard him give on the witness stand.

Cross-examination:

I attribute his present condition to the injury he is said to have received because I do not know of anything else that could have caused it. I can only trace the condition back to the injury because of the absence of anything else to produce it. I have known of a scratch on a man to produce his death. In three years a man might have various scratches about his

person as severe as one that might kill another man, and yet no bad effects results. My information as to Potts' disease is principally from what I have read, although I have seen some cases.

Redirect examination:

I attribute the plaintiff's condition to the injury he received and the symptoms he has described—that is, from the history of trauma and the absence of any other symptoms. The pains he says he suffered after the blow he received I would say were symptoms of Potts' disease, and the fact of such pains would be a factor I would consider in forming my diagnosis.

Dr. J. A. Moore testified for defendant:

I live at Marshall and am chief surgeon of the defendant's hospital there. Remember the circumstances of plaintiff being injured. Dr. McCurdy dressed the cut on his head, but my recollection is that I saw it. He was at the hospital every day for a while, and I saw the wound when it was dressed. The wound was in the occipital region somewhere in the back of the head. My recollection is that the wound healed without any trouble. I have not seen plaintiff since he was dismissed from the hospital. Have had 12 or 13 years' experience in hospital work. I know the history of what is called Potts' disease of the spine. Potts' disease is usually produced from some source inside the body. It is nearly always secondary to some other point of infection in the body; there must be some other disease to bring it out. Taking the history of the plaintiff's case as detailed by him on the stand and as it is now stated to me, and the fact that he worked off and on from the time he was hurt on March 3, 1908, until February, 1909, and that the knuckle in his back was not discovered until July, 1909, and the fact as stated that from about or shortly after the time of the injury he has had pains in his back, I do not believe the injury could have produced Potts' disease unless he had tubercular germs in his system at the time of its infliction. If he did have tubercular germs in his system at the time he was hurt, it is possible that his present condition would be due to the injury. It is not usual for Potts' disease to develop so long after an injury, but it is possible.

Cross-examined:

The authorities may give the length of time that the disease is in the course of development before the knuckle appears as from 10 to 24 months, with the maximum as three years, but for it to go three years would be very unusual and the trouble would have to be very chronic. That would be

unusual case. The disease would develop quicker in a person of low vitality than in one of strong vitality. I think a tubercular infection in some other part of the body would likely cause an infection in the spine and cause Potts' disease. That is what I meant when I said it would be necessary for the infection to exist before the injury in order for Potts' disease to set up. The fact that there was an injury to the spine would likely make a nest for the germs to work in, whereas if there had been no injury, the fact that the germs were in the system might not have resulted in any harm. In other words, the injury might produce inflammation which would cause a low condition of vitality at that place, and the germs in the body would attack that part because it is weakened and would make a starting place for them to go to work. I do not remember to have read in the authorities any instance of patients suffering with Potts' disease coughing up bone. I do not think I ever read the International Text Book of Surgery on that subject, but have read Dr. Hartsell's work. If such condition is stated to be true as one of the symptoms in the International Text Book of Surgery, I would consider that authority. It would be a very unusual condition, and I never heard of it. The early symptoms of Potts' disease are pains somewhat similar to those of muscular rheumatism or lumbago, and they are often erroneously diagnosed as rheumatism or lumbago; in fact, 90 per cent of the cases are erroneously diagnosed until the crook appears in the back.

Dr. N. J. Phenix testified for defendant:

I live at Colorado City, Texas, and have been engaged in the practice of medicine for 25 years. Know the plaintiff; first saw him January 2, 1909, and treated him professionally. I diagnosed his trouble as malaria and treated him accordingly. It seems I again saw him on the street some time during the month of January, and on the 30th of January I prescribed for him again, and at that time I diagnosed his ailment as lumbago and treated him for that. On his first visit to my office plaintiff showed me a scar on his head and told me he had got hurt, and that he had been struck on the head by a piece of timber. That was healed up and I gave him no treatment for it. I am familiar with Potts' disease of the spine. From the books I learn that Potts' disease of the spine, when produced by an injury, develops in a few months, and sometimes as long as a year or more. If it took 14 months for it to develop, that would be unusual. I had not seen plaintiff from the 30th of January until I saw him here.

Cross-examination:

I examined plaintiff yesterday. He has Potts' disease of the spine; I think there is no doubt about that being so. When plaintiff first called on me I gave him an anti-malaria treatment. He told me his head had been hurt. If he told me he had pains in his back, I do not remember it. If he had told me that, I would have attributed it to the fever he had. Do not remember whether I took his temperature. He was from East Texas, and I treated him pretty vigorously for malaria. Did not make a microscopic test of his blood to ascertain if he had malaria. One coming from East Texas and complaining of the symptoms plaintiff manifested we naturally suspect has malaria. I thought he had malaria at the time I saw him, and I think yet he had. The next time I saw him he did not have fever, and I gave him some medicine for his back. If Potts' disease is produced by trauma, it should set up within a few months. Do not mean to say that in a few months it would progress to such an extent that a knuckle would form in the back. It is a fact that the knuckle does not appear in some instances for more than a year after the initial injury. I could not say whether the usual period for the development of the knuckle is 18 months. Taking the history of the plaintiff's case as detailed by him, I could not answer whether his present condition is due to the hurt he received. I have not made up my mind sufficiently to answer as to that. I have my doubts about it, and had rather not hazard an opinion on it either way. I could not say it is not true, nor could I say it is true that his condition is due to the injury he received. I do not know from personal knowledge what per cent of Potts' disease is due to traumatism, but Dr. Wm. Osler says it follows trauma in a few cases. Dr. Osler is the man who says a man ought to be chloroformed when he reaches the age of 60. Sayer, who is a recognized authority, says that 50 per cent of the cases of Potts' disease follow an injury. The Encyclopædia of Medicine is edited by a great number of physicians, and he is the author of the article on Potts' disease. That work states that many cases of Potts' disease are diagnosed as something else, and that it is sometimes months and even years before the knuckle appears in the back, and the true diagnosis is arrived. I have not read the authority which states that the disease is most frequent in males because males are more liable to receive injuries. I recognize the doctrine that the knuckle in the spine is sometimes months and even years in making its appearance. There is such a thing as tubercular

bacillus lying dormant in the system. That being true, if a person receives in injury to the body which reduces the vitality of a particular portion, that portion is likely to be attacked by the germs and they will find a nest or lodgment there. At the place of inflammation produced by an injury the bacillus will find a fruitful field for infection. I do not mean that at the inflanimed portion of the body or the seat of the injury the germs would develop or have their origin, but being already in the system, they would find lodgment and become active at that place. If the pains in plaintiff's back followed immediately after the injury he received, I would be inclined to attribute them to the development of Potts' disease. Of course, I have to assume that he had told the truth about his symptoms immediately following the hurt to his head.

Redirect exemaniation:

If the system did not have tubercular germs in it, I do not believe the injury could have developed Potts' disease. If the patient has the tubercular germs in his system, and he receives an injury, they are more apt to become active and go to work than if no injury had been inflicted.

L. J. HOWELL testified by deposition for plaintiff:

Am 40 years of age, a farmer. Reside in Mitchell County, Texas, where I have lived for the past ten years. The plaintiff is my brother. Knew him during January and February, 1909, and he lived in Mitchell County on the Shurtleff farm about a half mile from where I lived. I sat up with him when he was sick and saw him every two or three days while he lived there. He tried to farm in Mitchell County. He moved there December 31, 1908, and stayed until the middle or last of May, 1909. He went from Mitchell County to his father's place which is about 80 miles from Marshall, Texas, and in Louisiana. He was very weak and greatly reduced in flesh while here. He was sick and complained of a hurting in his back and to some extent of a hurting in his side. Often when he had pains in his back we had to hold him up in the bed or stand him on the floor or find some position in which he could get ease. His back seemed to hurt him largely in the small part of it. That is where we applied the poultices. He looked very pale and most of the time walked in a very stooping posture. He could walk but little without resting, and when he walked to any extent, it would lay him up for some time. He was down in bed for four weeks and confined to his room for about two weeks longer. He was com-

plaining of a hurting in his back and a little hurting in his side. It seems to be in the small of his back and we bathed that part with liniment and applied poultices to it when he was in greatest pain. He would tell us that was the part that was hurting. He was not able to do any work while out here. He attempted to plow a little, but had to give it up. He was renting and not being able to work and make a crop, it would be difficult to get a place here, so he returned to father and mother, who could help him. He was very weak and unable to work when he left Mitchell County. He was really unable to work any of the time he was here. My father and mother were alive when I heard from them about a month ago. Father is in 70 and my mother in 60. Their health has been good so far I remember. My father and mother have never had consumption or tuberculosis, and if it has ever been in their families I never heard of it. They have no lingering disease that I know of. None of the relatives of the plaintiff, so far as I know, have ever had consumption.

Cross-examination:

It was during the month of February, 1909, that plaintiff tried to farm in the field. I could not say what portion of the time he ran a plow, as he would plow sometimes for a few hours or a half day, and then would not be able to plow for a day or two, and then again he would run the plow for a whole day, and then have to leave it off again. I could not tell what amount of time altogether he did plow. The first complaint I ever heard plaintiff make of his physical condition was when he arrived here and I walked into the depot to meet him. I then asked what was the matter with him, and he said, "It is my back." We then left the depot and went to my home, and as we went he told me he got hurt on the railroad. Dr. Willis R. Smith, now residing at El Paso, treated the plaintiff while here. I am 5 1-2 feet in height and weigh 120 pounds. Do not remember having a doctor with me but twice in my life. Have never heard the matter of whether any relative of plaintiff ever had consumption discussed.

GEORGE SHURTLIFF testified by deposition for plaintiff:

Am 56 years of age, reside in Mitchell County, Texas, and have lived here 5 years. Am a white man Became acquainted with plaintiff in December, 1908, and knew him about five months. He took charge of premises I rented to him. He lived on my farm as my tenant about 300 yards from my house and I saw him every day during the time he was in Mitchell County. When he first came to my place

he was down sick. While there he was down in bed about a month, and the rest of the time he was on my place he was not able to work. but was complaining and creeping about. He complained all the time. He was complaining of a hurting in his back and somewhat in his side. He looked very weak and bad. He was confined to his house nearly all the time. He could do nothing but lie in bed and creep around a little. He left this section of the State some time in May, 1909. He said he was going to his father's. He was not able to engage in physical labor on the farm, but he worked about a month in short spells. He tried to work. He was really not able to work any of the time. Plowing was the character of work he attempted to do. He looked pale and weak and thin and seemed to be without energy and unable to work. He complained of his side and back continually.

Cross-examination:

Never saw plaintiff prior to the time he received his injury. Of my own knowledge I do not know what caused his condition. I rented the land to plaintiff and his brother and they were to cultivate the land and W. A. Howell was recommended to me by his brother and that is how I came to know him. He had a physician attending him all the time I knew him. I have no expert knowledge of physical ailments. The work he attempted to do was in January and the first part of February, 1909. Plaintiff's attorneys wrote me to find what I knew and I told them I would answer interrogatories.

MRS. W. A. HOWELL testified for plaintiff:

I am the wife of plaintiff and have known him since 1895, and have known his family since about that time. We were living in Marshall and Mr. Howell was working in defendant's bridge gang at the time he was hurt. Saw plaintiff about eleven o'clock of the morning he was hurt. He had been to the hospital at that time. He returned to the hospital for treatment the next day. Think it was eight or ten days after he was hurt before he went back to work. He complained all during that time of suffering. He complained of pains in his back and shoulders and the back of his neck. He complained of his neck the next morning after he was hurt, and he then commenced to complain of pain through his shoulders and it worked up and down his back. He never did quit complaining of his back hurting him, and has complained of his back from that time until now. Before he was hurt he never complained of pains in his back. Prior to the

time he was hurt his health was just as good as that of any man in ordinary health. He complained of pains in his back after he went back to work. He was sick in the summer and again in the fall after he was hurt, but I could not state the exact time. He had two spells in the summer and in the fall again he was sick; he complained of hurting in his side and back. Dr. Raines gave him some medicine while he was sick in Marshall. I do not remember how long in the summer he was unable to work, but in the fall he was down five weeks, and could do nothing. He was confined to his bed and room and suffered with his back all the time. I nursed and waited on him and his suffering was intense. He could not sleep to do any good at all. We went to Mitchell County the last of December, 1908, and remained there until the third week in May, 1909, and during all that time he was very weak and suffering with his back and side While there at times he tried to plow and cut stalks in the field. He did not farm to do any good becaues he was sick and unable to work. He was confined to his bed four weeks of the time we were there, and had pains in his back and side. We applied poultices and liniments and did various things for him. During the four weeks he was in bed he suffered greatly and it looked like he could not bear any more. During the time he was not in bed he complained of suffering all the time, and his suffering was very intense. We went to Louisiana near Mansfield in May. Mr. Howell was first treated there by Dr. Stokes and then by Dr. Parsons, and he did not get any relief from his sufferings at any time by any physician. The last work plaintiff attempted to do was in Mitchell County, and he has been physically disabled from work. We live three-quarters of a mile from the home of plaintiff's father and have lived there since May, 1909. We have four children. None of them has ever had lung trouble or consumption, and none of them have had a bone disease. I have never had consumption or lung trouble, and my health has been good and the health of the children has been good. I know all the members of Mr. Howell's family, and I have never heard of any consumption in the family or any bone disease of any kind. Mr. Howell suffers some pain now; he suffers pain in the lower part of his back and hips and in his side at times. I do not think his sufferings are as severe now as they have been. He still complains of pains. Plaintiff has always been a laboring man.

Cross-examination:

We moved to Marshall six or seven months before plaintiff was injured. We lived near Mansfield before going to Marshall. Plaintiff has never worked for the railroad before we went to Marshall. If he worked for the railroad at any time before we moved to Marshall, I don't remember it. We lived on the farm near Mansfield before going to Marshall.

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W. A. HOWELL
vs.
TEXAS & PACIFIC RY. CO.

Suit pending in the United States Circuit Court for the Eastern District of Texas at Jefferson, Texas.

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Answers and depositions of J. H. Reuss, J. W. Embree and S. E. Milliken to direct interrogatories propounded to them in the above styled cause by S. P. Jones, attorney for plaintiff, and cross interrogatories propounded by F. H. Prendergast, taken before C. I. Evans, Jr., a Notary Public in and for Dallas County, Texas, in accordance with agreement on file.

Answers of the witness DR. J. H. REUSS to the direct interrogatories as indicated:

Q. Dr. Reuss, you, Dr. J. W. Embree and Dr. S. E. Milliken have just finished an examination of Mr. W. A. Howell and have heard read the description of his injury and a history of the condition after the injury, this description being read from the testimony of Mr. Howell taken in Mansfield, La., on the 8th day of September, 1910, and you have had a consultation together, after having made the examination. Please state in your own language the result of the examination, the disease from which Mr. Howell is suffering, with a full description as agreed upon by the three of you.

A. Well, we found that Mr. Howell is at the present time suffering with a condition known as tubercular spondyilitis, or Potts' disease, which has advanced to such an extent as to have produced a curvature and enlargement of certain portions of the spine, together with a psosas abscess.

Q. What effect has this disease or condition upon the person of Mr. Howell?

A. The effect of this condition upon Mr. Howell's physical ability or capability is such as to make him absolutely unable to do any physical work, continuing to undermine his

general physical activity and make him practically an invalid.

Q. What will be the probable future of the physical condition of the manhood of Mr. Howell?

A. If the condition is allowed to go on like it is now it is ultimately fatal.

Q. Taking the history of ths case and the condition in which you find Mr. Howell, what in your opinion caused the disease?

A. In our opinion the disease was started by a blow or a jar directly upon or transmitted to the spine of Mr. Howell, at a time when there existed in his system a tubercular tendency.

Q. By a tubercular tendency you mean that he had the bacillæ in his system?

A. I can answer that question only in this way, that that is the usual history of those cases. He has a direct history of traumatism. superinduced by the presence of tubercular bacilius which was requisite for the appearance of a tubercular spondylitis.

Q State whether the injury described was the cause of the lighting up of this tubercular spondylitis, or Potts' disease of the spine?

A. Yes, sir.

In answer to cross interrogatories propounded by F. H. Prendergast, Esq., said witness testified as follows:

Q. State whether or not the cut on the head, without being joined to the fact that a heavy weight struck plaintiff on the head and perhaps directly injured his spine, whether the cut on the head without the other would produce these conditions?

A. I don't think the cut on the head would have produced it. It took a blow on the spine, or a transmitted blow on the spine.

Q. What treatment should Mr. Howell have received from the time that it first developed that his spine was involved in the trouble, not agreeing exactly when that was, because he is not very definite about it?

A. He should have perfect immobilization of the spinal column for the purpose of keeping these involved areas separated, or from coming together, and thus producing absorption of the inflammation which has been produced, and with that the complication and the deformity, if it had not been stopped, would have been very much ameliorated, or the probabilities of the psosas abscess developing would have been prevented.

Q. In his present condition do you agree that this immobilization is the proper treatment from now on?

A. Yes, sir; to assist in his walking and assist in his moving about. He has no apparatus now that is worthy of the name of a support.

Q. Do you consider the support that he has now on his body adequate?

R. It is wholy inadequate. It is no better than a woman's corset.

J. H. REUSS.

Answers of the witness DR. S. E. MILLIKEN:

Graduated Medical Department University of Louisville, Ky., 1887. House surgeon Sts. Mary's and Elizabeth's Hospital, Louisville, Ky., 1887-8. House surgeon Hospital for Ruptures and Cripples, New York City, 1888 to 1889; assistant surgeon to same, 1889 to 1891. Surgeon to Randall's Island Hospital (Department Charities, New York City), 1894 to 1897. Private hospital in Dallas, Texas, 1897 to 1909.

The above answers made by Dr. J. H. Reuss I endorse and make as my own. Local surgeon T. & P. R. R. at Dallas.

SAM'L E. MILLIKEN.

Sworn to and subscribed before me this 3rd day of October, 1910.

C. I. EVANS, JR.,
(Seal) Notary Public, Dallas County, Texas.

Continuation of testimony of DR. J. H. REUSS:

(Questions by S. P. Jones, Esq.)

Q. Doctor, you have given the history, diagnosis and the result of the consultation between the three physicians named in the testimony above. I want you to tell me what you mean by a latent tubercular bacilli or condition that was brought to light or into activity by reason of this injury, this question applying to you individually?

A. Well, that was a question that we all three could have easily answered. By a tubercular focus being or lying latent in the system, we mean a condition that could have existed there from childhood, or could have started in middle life, and could have remained inactive during life, but which is frequently existed by just such conditions as occurred to Mr. Howell, in the form of blows and jars, when it becomes sufficiently actively disturbed to produce a localized inflammation of the particular part of the body where this latency existed, and goes on to gradual and continuous destruction of the particular parts involved, with complications and multiplcations of the original infection.

Q. Taking the history of this case, and assuming that when it was discovered that Mr. Howell had this disease commonly known as Potts' disease of the spine, that the backbone or spinal column had begun to curve and to the extent as to make a knuckle or knot on his back as large as a partridge egg, and to the extent that he was incapacitated from engaging in any labor, and had been for two or four months, even if he had been placed in this straight-jacket, or whatever you may term it, if he had received the proper support what would have been the probable effect and course of the condition or the disease?

A. Taking into consideration that Mr. Howell was forty-three years old when this condition was discovered, and that the prognosis is not as good at age forty as it is children, the result generally would be fatal eventually.

Q. If this disease had been arrested in the course of years, what effect would it have had on his ability to engage in manual labor or work in after life?

A. This trouble is generally cured by what we term an anchylosis or a complete union of the vertebræ involved, and makes it stiff during the rest of his life, preventing him from doing any work that required any activity of his body, in the way of bending or shoveling, etc., or physical or manual labor. Nature's cure is a permanent anchylosis, which means a stiff back that remains permanent and renders the patient incapable of doing any manual labor, such as his occupation demanded before, such as shoveling, lifting, straining, or anything of that kind.

Q. Can treatment applied now remedy the present deformity?

A. No treatment applied now can remedy the present deformity.

Q. Dr. Reuss, please state what experience you have had as a physician.

A. I graduated at Columbia College, New York, in 1889. I had hospital experience in New York City in the New York City Hospital and St. Luke's Hospital. I practiced medicine and surgery in the State of New Jersey and in the State of Texas. I have had, for the last fifteen years, a private hospital of my own, particularly for the practice of surgery, and at present am conducting a private hospital for that purpose, known as the Marsalis Sanitarium, Dallas, Texas, principally for the purpose of doing surgical work. I have been local surgeon for the Southern Pacific Railway Company and San Antonio & Aransas Pass Railway Company, at Ceuro, Texas,

for a period of ten years, until I moved to Dallas, where I engaged in the practice of surgery and conducting a private hospital. I was formerly medical director of the Southwestern Life Insurance Company, and examiner for a number of life insurance companies. I was a member of the first Board of Medical Examiners of the State of Texas, for a period of four years. J. H. REUSS.

Sworn to and subscribed before me, this 3rd day of October, 1910. C. I. EVANS JR.,
Notary Public, Dallas County, Texas.

Answers of the witness DR. J. W. EMBREE to direct interrogatories propounded by plaintiff:

Q. State your experience as a physician.

A. I finished in the University and Bellevue Hospital Medical College, New York City, in 1899. I was assistant physician Post Graduate Hospital, New York City, following graduation. I had several degrees in post graduate schools in Chicago and New York. In 1903 I took a special course in Vienna, Austria; for three years I had a private sanitarium of my own. I am a member of the City, County and State medical societies, and examiners for a number of life insurance companies.

I hereby adopt and make as my own each of the answers given by Dr. J. H. Reuss to the foregoing questions propounded to him. DR. J. W. EMBREE.

Sworn to and subscribed before me this 3rd day of October, 1910. C. I. EVANS, JR.,
Notary Public, Dallas County, Texas.

Supplemental interrogatories propounded by plaintiff to each of said witnesses:

1. If the proof shows Howell was hurt by a piece of timber two or three feet long and wedge-shaped, being about three inches in diameter at each end, and falling about twelve feet, striking him on the head while he was in a stooping position, and knocking him so that he fell and was dazed, do you think it produced sufficient concussion to cause the disease from which he is now suffering?

To the foregoing question Dr. J. W. Embree answers: Yes.

To the foregoing question Dr. J. H. Ruess answers: In my judgment it is not only possible, but highly probable that the present disease from which Howell is suffering had its starting point and origin from an injury produced as de-

scribed above. A transmitted injury to the spine by a blow on the head produces local disturbances in the spine in proportion to the weight and momentum of the missile that produced it.

To the foregoing question Dr. S. E. Milliken answers: Such injury could not have resulted in the subsequent diseased condition without there having been present at the time the bacillus of tuberculosis.

2. If the proof shows that Howell was hurt by a heavy piece of timber, several feet long, falling twelve feet or more and striking him on the head and knocking him so that he fell and was dazed, do you think it produced sufficient concussion to cause the disease from which Howell is suffering?

To the foregoing question Dr. J. W. Embree answers: Yes.

To the foregoing question Dr. J. H. Reuss answers: Yes.

To the foregoing question Dr. S. E. Milliken answers: The presence of the tuberculous bacillus was necessary to have produced the resulting conditions which we find in existence at present.

DR. J. W. EMBREE.
SAM'L E. MILLIKEN.
J. H. REUSS.

Sworn to and subscribed before me, this 3rd day of October, 1910.

C. I. EVANS, JR.,
(Seal) Notary Public, Dallas County, Texas.

STATE OF TEXAS,
COUNTY OF DALLAS.

I, C. I. Evans, Jr., a Notary Public in and for Dallas County, Texas, do hereby certify that the foregoing answers of J. H. Reuss, J. W. Embree and S. E. Milliken, the witnesses before named, were by them made before me, and were sworn to and subscribed before me by the said witnesses; that each of said witnsssees was first cautioned and sworn to testify to the truth, the whole truth and nothing but the truth; that the testimony of each of them was reduced to writing by them; and that after their said testimony was reduced to writing each of the said witnesses subscribed to the same.

Given under my hand and seal of office at Dallas, Texas, this 3rd day of October, 1910. C. I. EVANS, JR.,
(Seal) Notary Publis, Dallas County, Texas.

DR. A. A. TERHUNE, being recalled by plaintiff, testified:

Putting a man suffering with Potts' disease in a plaster of Paris cast or jacket is a hospital piece of work. In order for a physician to do that he must have experienced help, and it is essential to be in a hospital or have trained nurses or a physician to assist hm. It is almost an impossibility with a man from 40 to 45 years of age to secure solidity of the backbone so as to arrest the progress of the destruction by stiffening of the bone in Potts' disease.

Cross-examination:

What I mean to say is that a physician must have experienced assistance to put on a plaster jacket. It would take not less than three or four physicians to put it on. In the first place, there is an apparatus somewhat similar to a block and tackle that is attached to the patient. He has to be rigid on the table and swung with the block and tackle and the body is stretched and the parts brought even before the cast is put on. Two nurses and a physician could do it if the nurses knew their business. They must assist the doctor and know the steps to take. An ordinary physician would not have the proper apparatus. The table would have to be made so the middle portion could be removed and the body stretched and the bandage applied, and it has to be wet as it is applied, and the body must be immobile when it is applied.

MRS. W. A. HOWELL, recalled by plaintiff, testified:

Mr. Howell was not a man of any means when he was injured and was a day laborer dependent on his wages for a living. Since the injury he has had no means except what help he got from his friends. He has no property at all.

JOHN W. HARPER testified for plaintiff:

Live 18 miles west of Marshall and have lived there practically all my life. Am a farmer at this time. Know the plaintiff, and remember the circumstance of his being hurt at Marshall. I was near where he was hurt, and my brother H. L. Harper was near him when he was hurt. Had been working in the bridge gang three or fours months at the time plaintiff was hurt, and my brother had just commenced working in the gang that morning. At the time plaintiff was hurt I was out north of the coal chute framing some timbers. Plaintiff was digging with a shovel under the coal chute at the time he was hurt, I think to put in some foundation work, and my brother was working with him on the same job. Tom Cully was on top of the coal chute at the time of the accident

or injury to Mr. Howell, and was above Mr. Howell. He had some three or four men up there with him, and they were tearing off the decking or floor of the chute, and in doing this work they were using pinch bars and claw bars. I heard the foreman, Mr. Woodruff, tell Mr. Cully to take the men and go up there and do the work. Cully would sometimes take men and do a piece of work under the direction of Mr. Woodruff. He was a man who was regarded as capable of taking men and doing a piece of work. I saw the timber that struck plaintiff just as it started down, and it came from where the men were at work tearing up the floor. I saw the timber hit Mr. Howell and it knocked him down. It struck him on the head. He got up. He was in a stooping position digging in the ground at the time it struck him on the head. He fell and caught on his hands, and got up and fell again. He got up again and some of the workmen took hold of him and prevented him from falling any more. He went from there to the office for the purpose of going to the hospital. It was my understanding that he was going to the hospital. The timber that struck Mr. Howell was a piece of wedge-shaped decking, four or five feet long and about three inches thick and six or seven inches wide at the large end and sharp at the other end. The timber fell 12 or 13 or 14 feet.

Cross-examination:

The piece of decking was two or three inches thick; might have been two inches instead of three. I don't think I told counsel for defendant that the piece of timber that struck plaintiff was about three feet long. Think I told him three or four feet long or something like that. I was on the north side of the coal chute when he was hurt and 30 or 35 feet from him. It was forty minutes or an hour before plaintiff was hurt when I heard Woodruff send Cully above with the men. Do not remember whether they were taking all the chute floor up or not. Mr. Howell was making an excavation for the upright I was framing. Tennessee Reed was up there with Cully, but I don't remember who the two or three others were. I know Stewart, but I don't remember that he was or was not up there. I did not know all the gang by their correct names. There were some 18 or 20 men in the bridge gang, but I do not think they were all working on the coal chute. I think some of the men were working on the section house. The heavy end of the timber hit Mr. Howell. I just happened to raise up from my work and noticed the plank fall and hit plaintiff.

Redirect examination:

As well as I remember Dhanke and Cully went with plaintiff to the office after he was hurt.

HENRY HARPER testified for plaintiff:

Live in Harrison County and am a farmer. I was raised there. Know plaintiff and remember his being hurt at the coal chute. I was working there near Mr. Howell. Had just gone to work that morning; had not worked for the company before that day. I was working there with Mr. Howell and was directed to work there by Mr. Woodruff. I was working about six feet from plaintiff, and the first I knew of his being hurt two men were helping him up. I did not notice the piece of timber that struck him. It was pointed out to me afterwards; one of the men had it. It was four or five feet long and a piece of a 3x8 or 3x10 that had been split off, and it was a wedge shape. It was a fresh split piece of timber. The men were tearing up the floor of the coal chute. I presume Mr. Woodruff had control of the men and directed their work. The floor of the chute was 10 or 12 feet above plaintiff, and it might have been 13 or 14 feet.

Cross-examination:

The work the men were engaged in was repairing the coal chute or pockets, and I was there to do anything I was directed to do. If the men were to repair the coal chute, they had to go on top to do it. Had talk with defendant's counsel a day or two since relative to the dimensions of the piece of timber which fell on plaintiff's head ,and told him at that time that I did not see the timber strike the plaintiff, but I did not say that I did not see the plank and did not know the size of it. I do not remember what I was asked about the size of the plank. As well as I remember I told you the size of the plank, and I believe I told you it was three or four feet long and in a wedge shape.

Redirect examination:

At the time plaintiff was hurt Mr. Woodruff was standing eight or ten feet from him, as well as I remember.

L. H. VENTRESS testified for plaintiff:

Live at Quinlan, Texas, and am clearing land. Know the plaintiff, and have worked for the defendant in the bridge gange. Remember when plaintiff got hurt in March, 1908. I was then working on the coal chute where he was injured. Had been working in the gang six or eight months at that

time. Was working on top of the coal chute with Mr. Cully at the time plaintiff was injured. I think Mr. Woodruff sent us up there to work, but I don't remember hearing him tell us to go up there. Sometimes we worked under Woodruff, sometimes under Cully and sometimes under Brewer. Cully seemed to be a kind of straw boss. Do not remember how many men were on the coal chute, but there must have been four or five. Cully was directing the work up there. We were tearing up a portion of the floor or decking. The floor was made of either two or three-inch stuff and I could not say which. The plank were six or eight or ten inches wide. Some one said somebody was hurt or that we had hurt somebody or some remark of that kind, but I do not know who made the remark. Some one below said, "Lookout, you have hurt a man," or something like that. When I went up on the coal chute plaintiff was excavating under the coal chute.

Cross-examination:

We were taking up portions of the floor where we were going to renew the pockets. My recollection is that we were taking up the floor because it was in the way of our renewing the pocket and not because it was rotten. Plaintiff was digging in the ground to put in new posts. I do not believe there had been an old post at the place where he was digging. John Harper and others were framing posts as well as I remember. The floor we were taking up had been put down there to walk on, and we could not put the pockets where we wanted them without removing a portion of the floor. Some of the men, I presume, were immediately over plaintiff. Do not remember where Brewer was that day, and do not remember whether part of the men were working on the section house that day. Do not remember seeing Brewer at the coal chute. I was not working at the section house that day. There must have been three or four or five men on the coal chute, but Mr. Cully is all I remember. They were all Woodruff's men. I did not go down on the ground to see plaintiff after he was hurt. I knew it was plaintiff that was hurt because I knew him and saw him. Had known him two or three months. Do not know whether I appear on the pay rolls as being at work on the section house that day or not. I suppose Mr. Woodruff kept my time. I worked all through the shops and on the section house under Mr. Brewer. Do not remember what time I worked on the section house under Brewer. I am sure I have no other injury mixed up with the Howell injury. No other man got hurt at the coal chute that I know

of. I do not know the method of keeping time. I did not keep the time book and have never kept it.

Redirect examination:

We were tearing up the floor with pinch bars and claw bars. We would stick the points of the bars in the cracks and prize it up.

DR. A. A. TERHUNE, being recalled by plaintiff, testified: I am familiar with the remedies prescribed in the three prescriptions of Dr. Rains for the plaintiff which you exhibit to me. On November 10, 1908, he prescribed Vinetone, which is a reconstructive tonic. I do not know what it is composed of, but it is a proprietary preparation, and it is commonly known as a tonic. On November 16, 1908, he prescribed asperine and codine, and those medicines are anodines to relieve pain. November 20, 1908, he prescribed salicate of soda, and elixir of lactopeptin, which is a rheumatic remedy.

D. L. WOODRUFF testified for defendant:

I remember the time plaintiff was hurt. I was foreman of the bridge gang at that time. Was working for the defendant and had a gang of men under me. On the day plaintiff was injured, we were repairing a portion of the coal chute and putting in additional pockets. We were cutting out the decking to put in the new pockets and putting in posts to support the new pockets. The pockets we were putting in were additional pockets, and not new ones put in to take the place of old ones. The posts we were putting in were to be six by eight, and each pocket holds seven or eight tons, enough coal to supply an engine. Plaintiff was moving some old bark and cleaning off a place to put up an upright. He was under the coal chute. The two Harper boys were near plaintiff, I am sure, and a man named Orton was there and a man named Dhanke. Orton is now in Kentucky and has not been in the service for some time. Zack Stewart was not there, but he was working for me. Ventress on that day was not at the coal chute, but was working on the section house. Tom Brewer had charge of the work on the section house. Reed, Green, Taylor, Engledow and Edgewood and Ventress were working with Brewer on the section house. Dhanke was under the coal chute at the time plaintiff was hurt. I had a man named Cully on top of the coal chute, and I do not know just who was up there with him. Cully is not now in the service and I don't know where he is living. Brewer's men working on the section house were a part of my gang. I saw the plank

POOR

that struck plaintiff. I was there close and picked it up and carried it around awhile. It was a piece of ring-heart that had split off the edge of a 2x12, and had slivered off. The large end of it was two inches thick and between three and four inches wide and it was two or two and a half feet long. After carrying it around with me awhile I pitched it over in the wood pile, and it was about the same length as the wood they use in starting fires in the engines.

Cross-examination:

I was foreman of the bridge gang of about 18 men. Mr. Cully was working under me. I would explain a piece of work I wanted done to Cully, and would put men under him and let him have control and direction of the men, and they worked under his directions. I told him to go on the chute and remove the plank. I had separated the men that morning and did not tell Cully what men to take up there with him. I had given him authority to call on the men to go up there with him and do the work. Howell was clearing away the trash and digging a little hole to set the upright in. We would put some timbers under the upright. While plaintiff was doing the work below I sent Cully up with some men to get the lengths of the uprights and clear away the decking to place the new pocket, and while Cully and the men were up there the piece of timber fell and struck plaintiff. While they were prizing up the 2x12 plank the piece of ring-heart slivered off and fell. If they had noticed it closely they would not have prized it off without some one holding it. Plaintiff had no power or control over Cully. Howell did ordinary labor, but he took a higher rating, and got higher wages than an ordinary laborer. He worked for me in 1901 for three months. He was not a man that had control of other men. He was working under my directions and doing exactly what I told him to do. Whatever I told him to do he had to do if he held his job.

Redirect examination:

Howell worked for me in 1901 for three months and that was the first I knew of him. I believe he lived in Louisiana at that time. I did not see him any more until August, 1907, and he came to me at Marshall and asked for work and I gave him a job. He said he was living in Louisiana: that his health was bad and if he could get work he wanted to move to Marshall. He worked awhile and I asked for transportation for his family to Marshall. I took a copy of a memorandum

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showing how much he worked while he was under me. We figure 26 days as a month's work. He worked 13 days in August, 22 1-2 days in September, 25 days in October, 19 days in November, 20 1-2 days in December. January, 1908, 10 days, February 22 1-2 days, and he worked in March 14 1-2 days. That was the month he was injured. He was off four days and a half when he was hurt. He was let out because of a reduction of force on March 25, 1909. A number of others were let out at the same time. Mr. Howell said during the time he did not work that he was laying off on account of being sick. I do not know what was the matter with him except that I remember at one time he had some boils on his hands and arms.

J. T. BREWER testified for defendant:

I remember when plaintiff was hurt. I was working on the section house the day he was hurt. Green, Engledyle, Reed, two Taylor boys and Ventress were working on the section house under me. I had seven men in all. I know Ventress. The boys called him Red. Ventress was at work on the section house from the time we began until we got through unless he was sick. I don't think he laid off a day. He did not work anywhere else, and if he was away it was on account of laying off. I was working on the section house the very day Howell was hurt, and I did not hear of it until in the evening, but some of the men might have heard it earlier.

Cross-examination:

We went to work on the section house some time in February, but I do not know the exact date. I speak from recollection when I state the men who worked on the section house. I discharged one man while we were working on the section house. Men very often laid off, but could not say whether Ventress did or not. The books that are here don't show the section house work.

ERNEST DAHNKE testified for the defendant:

Remember when plaintiff was injured, and was working in Mr. Woodruff's gang at the time. I had been on the coal chute at work before he was hurt. Mr. Cully was up there, but I don't remember who else. I don't know that any one sent me up on top of the chute to work. I knew the work was there to be done and that was my work. Mr. Woodruff was my boss and I don't think there was any other boss there at the time. I don't think Mr. Ventress was at the coal chute that day.

Cross-examination:

Mr. Woodruff told me to go up on top and work, and I would not have gone up there unless I had been told to. I don't know that any one told me what to do up there. I had the floor had to be torn up. Cully was the man Woodruff would tell what to do and give him some men to do it. When Cully was off with a squad of men he had direction and control of them. Cully sometimes took the responsibility of directing what was to be done. Cully or any of the other men that knew directed what was to be done on the chute. I was on the ground at the time plaintiff was hurt. I had gone after some tools, and when I left the top of the chute the men were tearing up the decking. I do not know who told the men to tear up the decking. I went after the tools because we needed some more bars and mauls. Don't remember whether Cully told me to go get them or not. It is my recollection that Ventress was not there, but I would not be sure about it I now work in the shops. The hospital at Marshall is maintained by deductions from the employees' wages creating what is known as a hospital fund.

W. A. HOWELL, being recalled, testified:

At the time I was injured I was earning $2.25 per day.

It was agreed that at the time plaintiff was injured the American Mortality Table shows his life expectancy to have been *27* years.

CLARENCE BENNETT testified for plaintiff:

Know the plaintiff and remember his being hurt. Was working in the gang that morning, but at the particular time he was hurt I had gone to the depot for meat. The best I remember. Ventress was working on the coal chute the day plaintiff was hurt.

Cross-examination:

I was gone after the meat about 20 minutes. I am not sure Ventress was working on the coal chute, but that is my best collections. I had been in the gang two or three days at the time of the injury to plaintiff.

W. A. HOWELL, being recalled by defendant, testified:

When I worked for the city after I was hurt I got $1.25 per day, and when I worked at the round house I got $1.65 per day.

CHARGE.

Gentlemen of the Jury:

This is a case by W. A. Howell against The Texas & Pacific Railway Company. The plaintiff has brought this suit against the defendant and substantially alleges that about the 3rd day of March, 1908, he was in the employ of the defendant as a bridge hand and day laborer, and that on that day he had been set to work by the defendant in excavating under a coal chute for the purpose of erecting there a post, and that while he was engaged in that work other servants and employees of the defendant went upon the upper deck of the coal chute and proceeded to remove certain timbers and planks from the upper deck, and that in so doing one of the pieces of timber fell from the upper deck and struck the plaintiff on the head, and produced the injuries stated by him in his petition.

The defendant denies all the allegations of the plaintiff's petition, and alleges that, if the plaintiff was injured at all, it was through the negligence of his fellow servants who were engaged in removing the timbers from the upper deck of the coal chute, and that therefore the defendant is not liable for the negligence of the fellow servants of the plaintiff; and the defendant further alleges that, if plaintiff was injured at all, his injuries were the result of one of the risks ordinarily incident to the employment in which he was engaged, and that therefore the defendant is not liable.

The court does not undertake to state to you in detail all the allegations of the pleadings. They have been read in the hearing of the jury when you were first empaneled to try the case, and when you retire to deliberate as to your verdict these pleadings will be sent out with you, and, if you desire to do so, you have the privilege of reading them yourselves in order to ascertain fully the allegations made by the plaintiff and the allegations made by the defendant. The statement the court has endeavored to make has only been for the purpose of trying to acquaint the jury with the character of the issues involved in a brief manner so that you may be better able to understand the instructions as to the law which I will give you.

The denial of the allegations made in the plaintiff's petition by the defendant in its answer puts the plaintiff upon the proof of his case, and the burden of proof is upon the plaintiff to make out the facts necessary to entitle him to recover, as the court will proceed to explain to you, by a preponderance of the evidence, and, in case the jury should determine from

the circumstances of the whole case that the plaintiff has failed, by a preponderance of the evidence, to make proof of the facts necessary to entitle him to recover, as the court will proceed to explain further along in this charge, then it would be the duty of the jury to find a verdict for the defendant, because, as before stated, the burden of proof is upon the plaintiff to make out his case by a preponderance of the evidence.

I desire to inform you, gentlemen, in the first place, that it will not be sufficient to entitle plaintiff to recover merely to show that he was injured while in the employ of the defendant, and while at work for the defendant, by the falling of a piece of timber from the coal chute which struck him on the head, but, in order to entitle plaintiff to recover, he must go further than that and show by a preponderanec of the evidence that the injury of which he complains resulted from some negligent act of the defendant.

The court further informs you, gentlemen, that the defendant in this case was not an insurer of the safety of the plaintiff or any of its employees. The measure of legal duty required at the hands of the defendant is to exercise ordinary care to provide for its employees a reasonably safe place in which to work, and to exercise ordinary care to maintain the safety of that place during the progress of the work, and where the proof shows that the defendant has met this duty of exercising ordinary care to furnish to its employees a safe place in which to work, and has exercised ordinary care to maintain the safety of that place during the progress of the work, then the duty required of the defendant would be fulfilled, and, in case you find this to be a fact, the plaintiff would not be entitled to recover. (Upon the other hand, to state to you the converse of the position, the duty does devolve upon the defendant to exercise ordinary care to furnish a reasonably safe place in which its employees are to work, and to exercise ordinary care to maintain the safety of that place during the progress of the work, and if you find in this case that the defendant failed either to exercise ordinary care to provide a safe place in which plaintiff was to work, or failed to exercise ordinary care to maintain the safety of that place during the progress of the work, and if you further find that the failure to exercise such ordinary care in either instance resulted in injury to the plaintiff, he would be entitled to recover.)

The court has used in this charge the terms "negligence" and "ordinary care," and therefore it becomes important that the court should inform the jury as to the legal meaning of the terms "negligence" and "ordinary care."

Perhaps no briefer nor simplier definition has been discovered than to say to you that "negligence" is the want of ordinary care, and that "ordinary care" is that degree of care which a person of ordinary prudence would have exercised under the circumstances of the situation.

Now bear these two definitions in mind because in the further progress of the charge the court will have occasion to use the terms "negligence" and "ordinary care" because they are vital for the jury to understand in passing upon the facts of the case. "Negligence" is the want of ordinary care; and "ordinary care" is that degree of care which a person of ordinary prudence would have exercised under the circumstances of the situation.

In this case the plaintiff's right to recover if at all depends on the proof by a preponderance of the evidence that the defendant was guilty of an act of negligence in sending its employees to tear away and remove the upper deck of the coal chute while the plaintiff was engaged in excavating a place for a foundation underneath the coal chute. That is the act of negligence charged in the plaintiff's petition, and that must be the act of negligence which he must prove by a preponderance of the evidence in order to entitle him to recover. If after an investigation of the whole case, the jury should conclude that plaintiff has not shown by a preponderance of the evidence that the defendant was guilty of negligence in sending its employees upon the upper deck of the coal chute to tear away the timbers while plaintiff was engaged in excavating beneath the coal chute, then plaintiff would not be entitled to recover, because that is the act of negligence charged and which he must prove to entitle him to a verdict at your hands.

If the jury should conclude from the evidence that the plaintiff was injured, and that his injury was caused by the negligence of those employees of the defendant engaged in tearing away the timbers from the upper deck of the coal chute, then the plaintiff would not be entitled to recover. The reason of that is the fact that one servant is not authorized to recover for the negligence of his fellow servants and the court informs you here, as a matter of law, that the employees of the defendant who were engaged in tearing away the timbers from the upper deck of the coal chute were fellow servants of the plaintiff, and for their engligence, under the law, he is not entitled to recover. So, the duty of the jury is to determine whether or not the employees of the defendant who were sent to the upper deck of the coal chute to tear away

the timbers produced the injury to the plaintiff by their negligence, or whether the defendant itself was guilty of negligence in sending its employees to the upper deck to perform that service. It is a simple issue, but perhaps I had better state it to you again so that no mistake will be made. The issue for you to determine from the evidence is whether the plaintiff was injured through the negligence of the defendant company in sending its servants upon the upper deck to tear up the timbers while the plaintiff was engaged in excavating below, or whether you believe from the evidence that the injury was produced by the negligent manner in which the employees tore up the upper deck while the plaintiff was engaged in excavating below. If the jury find from a preponderance of the evidence that plaintiff's injuries were caused by the negligence of defendant in sending its employees to tear up the upper deck of the coal chute while plaintiff was excavating below, and that that act of the defendant was negligence which produced the injury complained of, then plaintiff can recover. On the other hand, if the jury find that the injuries of the plaintiff were produced by the negligent manner in which the employees tore up the upper deck of the coal chute while plaintiff was engaged in excavating below. then in that case the injury would have been the result of the negligence of a fellow servant, and for that plaintiff would not be entitled to recover. The court gives you that instruction and includes with it this propositon: If the jury find from a preponderance of the evidence that the defendant was guilty of negligence in sending its employees to the upper deck of the coal chute to tear up the timbers while plaintiff was engaged in excavating below, and if you find that the manner in which the coal chute was torn up was an act of negligence upon the part of the employees of defendant, and that both acts of negligence—that is, the act of negligence in sending the employees to the upper deck to perform the service, and the manner in which it was performed by the employees, both concurred to produce the injury to plaintiff, in that case the plaintiff would also be entitled to recover; but it is an indispensable element of the plaintiff's case for him to show by a preponderance of the evidence that the injuries of which he complains were the direct and proximate result of the act of the defendant in sending its employees to tear away the upper deck of the coal chtue while plaintiff was engaged in excavating below, and that it was an act of negligence as that term has been explained to you in the charge.

Now, the court further informs you, gentlemen, that the

plaintiff in the employment in which he was then engaged assumed the risks which are ordinarily incident to that employment, but he did not assume risks which were the result of the negligence of defendant. If you find from the evidence that plaintiff was injured while he was engaged in excavating for a foundation under the coal chute in question, and you further find that such injuries were the result of one of the risks ordinarily incident to the employment in which he was engaged, then you are instructed as a matter of law that under those circumstances the defendant would not be liable to plaintiff. But, on the other hand, if you believe from the evidence that the injury was the result of the negligence of the defendant, as already explained to you in the charge, the plaintiff would be entitled to recover. So, applying the facts in evidence to the instructions given you in charge, if the jury find from a preponderance of the evidence that the plaintiff, W. A. Howell, upon the occasion in question was, at the direction of the defendant, engaged in excavating under the coal chute for the purpose of preparing a foundation for the erection of a post or support for the coal chute, and that while engaged in that labor other employees of the defendant went to the upper deck of the coal chute and began there to tear away and remove the timbers of the upper deck; and if you believe from a preponderance of the evidence that the act of the defendant in sending its employees to the upper deck to remove the timbers while the plaintiff was engaged in excavating below was an act of negligence upon the part of the defendant which directly and proximately caused the injury to the plaintiff, then it will be your duty to return a verdict for the plaintiff. On the other hand, if you believe from the evidence that the servants of the defendant in removing the timbers from the upper deck of the coal chute were guilty of negligence, and that their negligence in the manner in which they removed the timbers from the upper deck resulted in the injury to the plaintiff, then plaintiff could not recover, because in such case the injury would be the result of the negligence of his fellow servants. At the same time, if you find from the evidence that the defendant company was guilty of negligence in sending its employees to the upper deck to tear away the timbers, and that after they got there and began their work of tearing away the timbers, they were guilty of negligence themselves, and that both negligences concurred to produce the injury—that is, the negligence of the defendant company in sending its employees to the upper deck to do that work while the plaintiff was excavating below and the negligence of the em-

ployees in the manenr in which they performed the work, both concurred to produce the injury to the plaintiff, then plaintiff could recover and it would be your duty to so find.

If you find for the plaintiff in this case, you will take into consideration the nature, character and extent of any injury which you may find from the evidence he has suffered as the direct and proximate result of the negligence of the defendant. You may also take into consideration the plaintiff's age and any impairment, diminution or destruction of his ability to labor and earn money; you may take into consideration any physical or mental pain which you may find from the evidence the plaintiff has suffered on account of the injury resulting from the negligence of the defendant, if any, and therefrom you will ascertain and determine what amount of cash money, if paid now, would be a fair and reasonable compensation to plaintiff for the injuries which you may believe he has sustained as the direct and proximate results of the negligence of the defendant. In reaching the amount of damages you will return for the plaintiff, if you find him entitled to damages, the jury must not be influenced by the poverty of the plaintiff nor the wealth of the defendant, but you must direct your attention in estimating the damages, if any, solely to the evidence admitted before you on the question of the injury which the plaintiff may have suffered, and bear in mind that the defendant is only liable, if at all, for such injuries as were the direct and proximate result of the act of negligence relied upon by the plaintiff.

There is evidence in the case, gentlemen, that plaintiff is now suffering from a disease called "Potts' disease," or tuberculosis of the spine, and it is important, therefore, for the jury, if you find the plaintiff is entitled to recover, to determine whether that condition of the plaintiff was produced by the injury of which he complains or produced from other causes. If the jury find that the present condition of the plaintiff is the direct and proximate result of the injury he sustained by being struck by the falling piece of wood, then you may take the present condition of the plaintiff into consideration in estimating the amount of his damages, but the jury will not be authorized to assume that the condition of the plaintiff at present—that is, the "Potts' disease," or tuberculosis of the spine, was produced by the injury which he received through the lick on his head by the falling piece of timber. Before you would be authorized to consider the present condition of the plaintiff in that regard, you must find from the evidence that his present condition was produced by the injury of which

he complains. I further charge you, gentlemen, that if the present condition of the plaintiff was produced by tuberculous germs—I will use that term—then the defendant would not be liable for his present condition, even though you may find the plaintiff would be entitled to damages for injuries suffered from the striking of his head by the piece of timber. But in this connection I further say to you that, if you find from the evidence before you that the plaintiff's system was impregnated with tuberculous germs, or that he had tuberculous germs in his system, and that those germs were brought into activity by the injury of which he complains, and that without that injury they would not have been brought into activity and the present condition of plaintiff would not have resulted, then you may consider the present condition of the plaintiff in estimating the amount of damages which you may believe him to be entitled to recover.

As to all those questions you are the exclusive judges. You are the exclusive judges of all the facts in the case.

You are to decide under the instructions given you in this charge whether the defendant was guilty of an act of negligence in sending the employees to tear up the upper deck of the coal chute, and it is for you to decide whether his injuries were produced by that act of negligence on the part of the defendant company, or whether they were produced by the negligence of his fellow servants in the manner in which they tore up the timbers of the coal chute. It is also a question of fact for the jury to determine whether the present condition of the plaintiff is the direct and proximate result of the injuries of which he complains. All these things are matters of fact to be settled by the jury, bearing in mind that you are not authorized to assume that the present condition of the plaintiff is the result of his injuries, but must find that fact from the evidence submitted to you.

You are the exclusive judges of the credibility of the witnesses, the circumstances in evidence and the weight to be given to the testimony of the witnesses.

If you find for the plaintiff, prepare a written verdict in this form, "We, the jury, find for the plaintiff, and assess his damages at dollars," filling in the blank with the amount of damages you may find, and let that verdict be signed by some member of your body to be selected as foreman.

If you find for the defendant, you will simply write out a verdict saying, "We, the jury, find for defendant," and let that verdict be signed by some member of your body to be selected by you as your foreman.

Mr. Prendergast: We except to the charge of the court for the following reasons:

No. (5) We ask the court to charge that under the circumstances of this case, it was not the duty of the defendant to furnish Howell a safe place in which to do the work which he was engaged in performing at the time he was injured.

2. The defendant excepts to the charge of the court wherein he charges the jury that if Woodruff was negligent in sending the men above, and if the men above were negligent in the manner in which they removed the decking, then plaintiff could recover, because: -. It is not alleged that there was any negligence on the part of the men above. 2. It is alleged in plaintiff's supplemental petition that the negligence of the men tearing up the decking was not the proximate cause of the injury.

3. Defendant excepts to the court's charge wherein he submitted to the jury that in finding for the plaintiff, on the measure of damages they could take into consideration his present condition, because the evidence is not sufficient to show that the present condition was caused by any act of negligence on the part of defendant.

No. (6) The defendant requests the court to charge the jury that plaintiff can not recover if he knew the other employees were above tearing up the decking, or that by ordinary circumspection a man in his position should have known it, and in that case he can not recover.

5. The defendant excepts to the court's charge wherein he says the jury may consider plaintiff's present condition in fixing the amount of damages, although the presence of tuberculous germs in his system was the cause of the injury he received producing his present condition.

6. The defendant excepts to the refusal of the court to give the special instructions requested by it.

No. (7) The defendant orally requests the court to charge the jury that it would not be negligence in the foreman Woodruff to sent one of the servants to the upper deck to work while Howell was working below, if the jury believe that the careful performance of the work on the upper deck would not have resulted in injury to plaintiff.

Charges No. (5), No. (6) and No. (7) set out above were requested by the defendant before the jury retired and

the court refused to give each one and the defendant then and there excepted to the refusal of each.

Before the jury retired to consider of their verdict, the defendant in open court requests the court to give in charge to the jury the following special instructions numbered from one to four, each of which charges were refused by the court, and defendant then and there excepted to the refusal of each:

1. "The jury are charged that the evidence fails to show any negligence of the railway company that would make it liable in this case. You will, therefore, find a verdict for the defendant."

2. "The jury are charged: The fact that Mr. Howell was injured while he was working for defendant carries with it no presumption of negligence on the part of the railway company. And it is not sufficient for the employee to show that the employer may have been guilty of negligence. The evidence must point to the fact that the railway company was negligent."

3. "The jury are charged: An employee as Howell was assumes the risk of a danger of which he has actual knowledge and of such hazards as he would have learned by the exercise of that ordinary circumspection which a prudent man would have used in the particular employment. The employee can not shut his eyes to dangers that are obvious to an ordinary man."

4. "The jury are charged: That the plaintiff appears at this time to be suffering from a disease of the spine. It is claimed by the plaintiff that such disease is caused by the blow on the head inflicted at the coal chute on March 3, 1908. Before you can give damages for his present condition you must believe that the blow on the head caused the present condition; not that it may have caused it."

The jury on February 28, 1911, returned into court a verdict for the plaintiff for $8,000.00, and judgment was entered accordingly.

The court ordered a stay of execution for 42 days to allow defendant to move for a new trial, and the cause was retained and kept open for the purpose of preparing and settling and filing bill of exceptions.

The Texas & Pacific Railway Company presents the above

bill of exceptions and prays same be approved and allowed.

Which is by the court done accordingly.

Allowed. GORDON RUSSELL,

Correct: Judge.

S. P. JONES,

Attorney for Plaintiff.

UNITED STATES OF AMERICA,
FIFTH JUDICIAL CIRCUIT, SS.

The President of the United States,

To the Honorable the Judges of the Circuit Court of the United States for the Eastern District of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between The Texas & Pacific Railway Company, plaintiff in error, and W. A. Howell, defendant in error, a manifest error hath happened, to the great damage of the said The Texas & Pacific Railway Company, plaintiff in error, as by its complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Fifth Circuit, together with this writ, so that you have the same at New Orleans, in said circuit, in not exceeding thirty days from the 22nd day of March, 1911, being the date of issuance of the citation herein, in the said United States Circuit Court of Appeals, to be then and there held. that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 22nd day of March, in the year of our Lord one thousand nine hundred and eleven.

(Seal) C. C. BUMPAS,

Clerk of the Circuit Court of the United States,
for the Eastern District of Texas.

By W. E. SINGLETON, JR., Deputy.

Allow by Gordon Russell, United States District Judge.

I hereby certify that a true copy of the within writ has this day been lodged in the clerk's office for the use of the defendant in error.

Dated 22nd day of March, 1911.

C. C. BUMPAS,
Clerk of the Circuit Court of the United States
for the Eastern District of Texas.

By W. E. SINGLETON, JR., Deputy.

Writ of error filed 22nd day of March, A. D. 1911
C. C. BUMPAS, Clerk.

By W. E. SINGLETON, JR., Deputy.

UNITED STATES OF AMERICA,
FIFTH JUDICIAL CIRCUIT, SS.

The President of the United States,

To W. A. Howell and S. P. Jones, his solicitor of record, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Fifth Circuit to be held at the City of New Orleans, in the State of Louisiana, in said circuit, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Eastern District of Texas, wherein The Texas & Pacific Railway Company is plaintiff in error and W. A Howell is defendant in error, to show cause, if any there be, why the judgment rendered against said Texas & Pacific Railway Company, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 22nd day of March, A. D. 1911, and of the independence of the United States the one hundred and ..... year.

GORDON RUSSELL,
United States District Judge.

I accept service of the within citation in error on this March 23rd, 1911.

S. P. JONES,
Attorney for W. A Howell,
Defendant in Error.

Citation filed 22nd day of March, A. D. 1911.
C. C. BUMPAS, Clerk.

By W. E. SINGLETON, JR., Deputy.

In the Circuit Court of the United States for the Eastern District of Texas, at Jefferson.

W. A. HOWELL
No. 568. vs.
THE TEXAS & PACIFIC RAILWAY COMPANY.

Know all men by these presents, That we The Texas & Pacific Railway Company, a corporation duly incorporated and organized under and by virtue of an Act of Congress of the United States, as principal, and as sureties, are held and firmly bound unto W. A. Howell, plaintiff in above styled cause, in the sum of fifteen thousand dollars, to be paid to the said W. A. Howell, his executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents, sealed with our seals, using scrolls for seals, and signed with our names, this the....day of March, A. D. 1911.

The condition of the foregoing bond is such, that, whereas, lately at a term of the Circuit Court of the United States, for the Eastern District of Texas, at Jefferson, in a suit pending in said court, between W. A. Howell, plaintiff, and The Texas & Pacific Railway Company, defendant, numbered 568 on the docket of said court, a judgment was rendered on the 28th day of February, A. D. 1911, that the plaintiff, W. A. Howell, should have and recover of the defendant the sum of eight thousand dollars, with six per cent per annum thereon from date of rendition, as well as all costs of suit; and,

Whereas, said The Texas & Pacific Railway Company has obtained a writ of error, and has filed a copy thereof in the office of the clerk of said court to reverse said judgment, and also a citation directed to said W. A. Howell, and his attorney of record, S. P. Jones, citing and admonishing them to be and appear at the United States Circuit Court of Appeals for the Fifth Circuit, to be holden at New Orleans, Louisiana, within thirty days from the date thereof.

Now, if the said The Texas & Pacific Railway Company shall prosecute its writ of error to effect, and answer all damages and costs, if it fail to make good its plea, then the above

obligation to be void, else to remain in full force and virtue.

THE TEXAS & PACIFIC RAILWAY COMPANY (Seal)
By F. H. PRENDERGAST, *Agent* (Seal)
EDW. O. TENISON. (Seal)
J. H. ARDREY. (Seal)

Approved: GORDON RUSSELL, Judge.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF TEXAS.

I, Louis C. Maynard, Clerk of the Circuit Court of the United States for the Northern District of Texas, do hereby certify that the sureties on the within bond are known to me and that in my opinion they are good for the amount therein stated, and that if said bond were presented to me for approval I would approve the same.

Given under my hand and the seal of said court, at Dallas, Texas, this 15th day of March, A. D. 1911.

LOUIS C. MAYNARD, Clerk.

By GEO. W. MICTHELL, Deputy.

Writ of error bond filed 22nd day of March, A. D. 1911.

C. C. BUMPAS, Clerk.

By W. E. SINGLETON, JR., Deputy.

In the U. S. Circuit Court, Eastern District of Texas, at Jefferson, Texas.

W. A. HOWELL
vs. Circuit Court No. 568.
TEXAS & PACIFIC RAILWAY COMPANY.

To the Honorable Judges of said Court:

Now comes the defendant in the above cause, The Texas & Pacific Railway Company, and shows to the court that the above is a suit filed by W. A. Howell for personal injuries, and that a judgment was rendered in this cause in favor of the plaintiff, W. A. Howell, for the sum of $8,000.00 against the defendant, The Texas & Pacific Railway Company, on the 28th day of February, 1911, and in the proceedings and in the rendition of said judgment the said court has committed errors as follows:

FIRST.

The court erred in refusing special charge No. 1, requested by the defendant, as follows:

"The jury are charged that the evidence fails to show any negligence of the railway company that would make it liable in this case, you will therefore find a verdict for the defendant."

SECOND.

The court erred in refusing special charge No. 2, requested by the defendant, as follows:

"The jury are charged:' The fact that Mr. Howell was injured while he was working for defendant carries with it no presumption of negligence on the part of the railway company. And it is not sufficient for the employee to show that the employer may have been guilty of negligence. The evidence must point to the fact that the railway company was negligent."

THIRD.

The court erred in refusing special charge No. 3, requested by the defendant, as follows:

"The jury are charged: An employee as Howell was assumes the risk of a danger of which he has actual knowledge and of such hazards as he would have learned by the exercise of that ordinary circumspection which a prudent man would have used in the particular employment. The employee can not shut his eyes to dangers that are obvious to an ordinary man."

FOURTH.

The court erred in refusing special charge No. 4, requested by the defendant, as follows:

"The jury are charged: That the plaintiff appears at this time to be suffering from a disease of the spine. It is claimed by the plaintiff that such disease is caused by the blow on the head inflicted at the coal chute on March 3, 1908. Before you can give damages for his present condition you must believe that the blow on the head caused the present condition, not that it may have caused it."

FIFTH.

The court erred in refusing special charge No. 5, requested by the defendant, as follows:

"We ask the court to charge that under the circumstances of this case it was not the duty of the defendant to furnish Howell a safe place in which to do the work he was engaged in performing at the time he was injured."

SIXTH.

The court erred in refusing special charge No. 6, requested by the defendant, as follows:

"The defendant requested the court to charge the jury that plaintiff can not recover if he knew the other employees were above tearing up the decking, or that by ordinary circumspection a man in his position should have known it, and in that case he can not recover."

SEVENTH.

The court erred in refusing special charge No. 7, requested by the defendant, as follows:

"The defendant requests the court to charge the jury that it would not be negligence in the foreman Woodruff to send one of the servants to the upper deck to work while Howell was working below, if the jury believe that the careful performance of the work on the upper deck would not have resulted in injury to plaintiff."

EIGHTH.

The court erred in charging the jury as follows: "If the jury find from a preponderance of the evidence that the defendant was guilty of negligence in sending its employees to the upper deck of the coal chute to tear up the timbers while plaintiff was engaged in excavating below, and if you find that the manner in which the coal chute was torn up was an act of negligence upon the part of the employees of defendant, and that both acts of negligence, that is, the act of negligence in sending the employees to the upper deck to perform the service, and the manner in which

it was prformed by the employees, both concurred to produce the injury to plaintiff, in that case the plaintiff would also be entitled to recover."

This was error, because it is not alleged that there was any negligence on the part of the men working on the deck above Howell, and it is alleged in plaintiff's supplementary petition that the negligence of the men tearing up the decking was not the proximate cause of the injury.

NINTH.

The court erred in charging the jury as follows: "Upon the other hand, to state to you the converse of the position, the duty does devolve upon the defendant to exercise ordinary care to furnish a reasonably safe place in which its employees are to work, and to exercise ordinary care to maintain the safety of that place during the progress of the work, and if you find in this case that the defendatn failed either to exercise ordinary care to provide a safe place in which plaintiff was to work, or failed to exercise ordinary care to maintain the safety of that place during the progress of the work, and if you further find that the failure to exercise such ordinary care in either instance resulted in injury to the plaintiff, he would be entitled to recover."

This was error, because under the circumstances of this case Howell, being sent with others to repair a defective coal chute, the rule that he must have a safe place to work has no application.

TENTH.

The court erred in charging the jury as follows: "If the jury find that the present condition of the plaintiff is the direct and proximate result of the injury he sustained by being struck by the falling piece of wood, then you may take the present condition of the plaintiff into consideration in estimating the amount of his damages, but the jury will not be authorized to assume that the condition of the plaintiff at present, that is, the 'Potts' disease,' or tuberculosis of the spine, was produced by the injury which he received through

the lick on his head by the falling piece of timber."

This was error, because the evidence was not sufficient in law to show that plaintiff's present condition resulted from the injury he received in March, 1908.

ELEVENTH.

The court erred in charging the jury as follows: "But in this connection I further say to you that, if you find from the evidence before you that the plaintiff's system was impregnated with tuberculous germs, or that he had tuberculous germs in his system, and that those germs were brought into activity by the injury of which he complains, and that without that injury they would not have been brought into activity and the present condition of plaintiff would not have resulted, then you may consider the present condition of the plaintiff in estimating the amount of damages which you may believe him to be entitled to recover."

This was error, because if the plaintiff's system had tubercular germs in it when he received the injury, then the present condition of the plaintiff would not be the proximate result of the slight injury he received on the head in March, 1908. It would not be just to make the defendant pay damages measured on the plaintiff's present condition, when the injury he received was so comparatively slight.

Wherefore, The Texas & Pacific Railway Company prays that it be allowed a writ of error to have said cause reviewed and said errors corrected in the United States Circuit Court of Appeals for the Fifth Circuit, and it prays that the judgment be reversed.

And that supersedeas bond be fixed at $15.000.00.

F. H. PRENDERGAST,
Attorney for Texas & Pacific Ry. Co.

March 21st, 1911, allowed and supersedeas bond placed at $15,000.00.

GORDON RUSSELL,
U. S. District Judge.

Assignment of errors filed March 22nd, A. D. 1911.

C. C. BUMPAS, Clerk.
By W. E. SINGLETON, JR., Deputy.

CLERK'S CERTIFICATE.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS, AT JEFFERSON.

I, C C. Bumpas, Clerk of the Circuit Court of the United States for the Eastern District of Texas, at Jefferson, do hereby certify that the foregoing and attached pages of manuscript numbered in the margins of said pages from (1 to), both inclusive, contain a full, true and correct copy of the record, bill of exceptions, assignment of error and all of the proceeding in cause No. 568, wherein W. A. Howell is plaintiff and The Texas & Pacific Railway Company is defendant, and the writ of error and citation in error are included therein, as fully as the same remains on file and record in my office at Jefferson, Texas.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Circuit Court of the United States of America for the Eastern District of Texas, at Jefferson, at my office in said City of Jefferson, this the....day of....., A. D. 1911.

.....

Citation.

UNITED STATES OF AMERICA,
Fifth Judicial Circuit, ss:

The President of the United States to W. A. Howell and S. P. Jones, his solicitor of record, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Fifth Circuit to be held at the City of New Orleans, in the State of Louisiana, in said Circuit, within thirty days from the date of this writ, pursuant to a Writ of Error filed in the Clerk's Office of the Circuit Court of the United States for the Eastern District of Texas, wherein The Texas & Pacific Railway Company is Plaintiff in Error and W. A. Howell is Defendant in Error to show cause, if any there be, why the Judgment rendered against said Texas & Pacific Railway Co. as in the said Writ of Error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 22 day of March A. D. 1911, and of the independence of the United States the one hundred and — year.

GORDON RUSSELL,
United States District Judge.

I accept service of the within citation in Error on this March 23rd, 1911.

S. P. JONES,
Attorney for W. A. Howell, Defendant in Error.

The foregoing has the following indorsements to-wit: 2213. No. 568. The Texas & Pacific Ry. Co., vs. W. A. Howell. Citation. Filed 22 day of March, A. D. 1911. C. C. Bumpas, Clerk. By W. E. Singleton, Jr., Deputy. U. S. Circuit Court of Appeals. Filed May 6, 1911. Charles H. Lednum, Clerk.

Writ of Error.

UNITED STATES OF AMERICA,
Fifth Judicial Circuit, ss:

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the Eastern District of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between The Texas & Pacific Railway Company plaintiff in error, and W. A. Howell, defendant in error, a manifest error hath happened, to the great damage of the said The Texas & Pacific Railway Company plaintiff in error, as by its complaint appears; we being willing that error, if any hath been, should be duly

corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Fifth Circuit, together with this writ, so that you have the same at New Orleans, in said Circuit, in not exceeding thirty days from the 22 day of March, 1911, being the date of issuance of the citation herein, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 22 day of March, in the year of our Lord one thousand nine hundred and eleven.

[SEAL.]

C. C. BUMPAS,
Clerk of the Circuit Court of the United States
for the Eastern District of Texas,
By W. E. SINGLETON, JR.,
Deputy.

Allowed by
GORDON RUSSELL,
United States District Judge.

I hereby certify that a true copy of the within writ has this day been lodged in the Clerk's office for the use of the defendant in error. Dated 22 day of March, 1911.

C. C. BUMPAS,
Clerk of the Circuit Court of the United States
for the Eastern District of Texas,
By W. E. SINGLETON, JR.,
Deputy.

The foregoing has the following indorsements to-wit: No. 2213. No. 568. The Texas & Pacific Railway Company vs. W. A. Howell. Writ of Error. Filed 22nd day of March, A. D. 1911. C. C. Bumpas, Clerk, By W. E. Singleton, Jr., Deputy. U. S. Circuit Court of Appeals. Filed May 6, 1911. Charles H. Lednum, Clerk.

Argument and Submission.

No. 2213.

TEXAS & PACIFIC RAILWAY COMPANY
vs.
W. A. HOWELL.

Nov. 13, 1911.

On this day this cause was regularly called, and after argument by F. H. Prendergast, Esq., for plaintiff in error, and S. P. Jones, Esq., for defendant in error, was submitted to the court.

Opinion of the Court.

United States Circuit Court of Appeals, Fifth Circuit.

No. 2213.

TEXAS & PACIFIC RAILWAY COMPANY
v.
W. A. HOWELL.

Error to the Circuit Court *for* the United States for the Eastern District of Texas.

Before Pardee and Shelby, Circuit Judges, and Grubb, District Judge.

By the COURT: On the evidence, this case was properly submit to a jury. The instructions given to the jury cover the case a they are, so far as attacked in this court, free from reversible err Necessarily the judgment of the Circuit Court is Affirmed.

(Original filed Dec. 11, 1911.)

Final Judgment.

No. 2213.

THE TEXAS & PACIFIC RAILWAY COMPANY
vs.
W. A. HOWELL.

This cause came on to be heard on the transcript of the rec from the Circuit Court of the United States for the Eastern Distr of Texas, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudg by this court that the judgment of the said Circuit Court in t cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the plaintiff in error, T Texas & Pacific Railway Company, and the sureties on the writ error bond herein, Edw. O. Tenison and J. H. Ardrey, be condemn to pay the costs of this cause in this court, for which execution n be issued out of said Circuit Court.

December 11, 1911.

Petition for Writ of Error and Assignment of Errors.

United States Circuit Court of Appeals of the 5th Circuit.

THE TEXAS & PACIFIC —, Plaintiff in Error,
vs.
W. A. HOWELL, Defendant in Error.

Petition for a Writ of Error.

Your petitioner, the Texas & Pacific Railway Company, Plaintiff in Error in the above cause respectfully shows to the Court that the above entitled cause is now pending in the United States Circuit Court of Appeals in the 5th Circuit, and that the judgment has been therein rendered on the 11th day of December, 1911, affirming a judgment of the Circuit Court of the United States of the Eastern District of Texas, for the sum of Eight Thousand Dollars ($8000.00), in favor of W. A. Howell, against the Texas & Pacific Railway Company, and that the matter in controversy in said suit exceeds One Thousand Dollars besides costs, and that the jurisdiction of none of the Courts above mentioned is or was dependent in anywise for the opposite parties of the said suit being aliens and citizens of different states, and the cause does not arise under the patented laws nor the revenue laws or criminal laws, that it is not admiralty case, and it is a proper case to be reviewed upon writ of error. Wherefore your petitioner prays that a writ of error be allowed it directing the Clerk of the United States Circuit Court of Appeals of the 5th Circuit to send the record and proceedings to the Supreme Court of the United States that the errors complained of may be corrected.

Said error being as follows:

First.

The Circuit Court of Appeals erred in holding that the Circuit Court was correct in refusing the following charges:

"The jury are charged that the evidence fails to show any negligence of the railway company that would make it liable in this case, you will therefore find a verdict for the defendant."

Second.

The Circuit Court of Appeals erred in holding that the Circuit Court was correct in refusing the following charges:

"The jury are changed: The fact that Mr. Howell was injured while he was working for defendant carries with it no presumption of neglogence on the part of the railway company. And it is not sufficient for the employee to show that the employer may have been guilty of negligence. The evidence must point to the fact that the railway company was negligence."

Third.

The Circuit Court of Appeals erred in holding that the Circuit Court was correct in refusing the following charges:

"The jury are charged: An employee as Howell was assumes the risk of a danger of which he has actual knowledge and of such hazards as he would have learned by the exercise of that ordinary circumspection which a prudent man would have used in the particular employment. The employee can not shut his eyes to dangers that are obvious to an ordinary man."

Fourth.

The Circuit Court of Appeals erred in holding that the Circuit Court was correct in refusing the following charges:

"The jury are charged: That the plaintiff appears at this time to be suffering from a disease of the spine. It is claimed by the plaintiff that such disease is caused by the blow on the head inflicted at the coal chute on March 3rd, 1908. Before you can give damages for his present condition you must believe that the blow on the head caused the present condition, not that it may have caused it."

Fifth.

The Circuit Court of Appeals erred in holding that the Circuit Court was correct in refusing the following charges:

"We ask the Court to charge that under the circumstances of this case it was not the duty of the defendant to furnish Howell a safe place in which to do the work he was engaged in performing at the time he was injured."

Sixth.

The Circuit Court of Appeals erred in holding that the Circuit Court was correct in refusing the following charges:

"The defendant requested the Court to charge the jury that plaintiff can not recover if he knew the other employees were above tearing up the decking, or that by ordinary circumspection a man in his position should have known it, and in that case he can not recover."

Seventh.

The Circuit Court of Appeals erred in holding that the Circuit Court was correct in refusing the following charges:

"The defendant requests the Court to charge the jury that it would not be negligence in the foreman, Woodruff, to send one of the servants to the upper deck to work while Howell was working below, if the jury believe that the careful performance of the work on the upper deck would not have resulted in injury to plaintiff."

Eighth.

The Circuit Court of Appeals erred in holding that the Circuit Court was correct in charging the jury as follows:

"If the jury find from a preponderance of the evidence that the

defendant was guilty of negligence in sending its employees to the upper deck of the coal chute to tear up the timbers while plaintiff was engaged in excavating below, and if you find that the manner in which the coal chute was torn up was an act of negligence, that is, the act of negligence in sending the employees to the upper deck to perform the services, and the manner in which it was performed by the employees, both concurred to produce the injury to plaintiff, in that case the plaintiff would also be entitled to recover." This was error because it is not alleged that there was any negligence on the part of the man working on the deck above Howell, and it is not alleged in plaintiff's supplementary petition that the negligence of the men tearing up the decking was not the proximate cause of the injury.

Ninth.

The Circuit Court of Appeals erred in holding that the Circuit Court was correct in charging the jury as follows:

"Upon the other hand, to state to you the converse of the position, the duty does devolve upon the defendant to exercise ordinary care to furnish a reasonably safe place in which its employees are to work, and to exercise ordinary care to maintain the safety of that place during the progress of the work, and if you further find that the failure to exercise such ordinary care in either instance resulted in injury to the plaintiff, he would be entitled to recover." This was error, because under the circumstances of this case Howell, being sent with others to repair a defective coal chute, the rule that he must have a safe place to work has no application.

Tenth.

The Circuit Court of Appeals erred in holding that the Circuit Court was correct in charging the jury as follows:

"If the jury find that the present condition of the plaintiff is the direct and proximate result of the injury he sustained by being struck by the falling peice of wood, then you must take the present condition of the plaintiff into consideration in estimating the amount of his damages, but the jury will not be authorized to assume that the condition of the plaintiff at present, that is, the Potts disease or tuberculosis of the spine, was produced by the injury which he received through the lick on his head by the falling piece of timber." This was error because the evidenec was not sufficient in law to show that plaintiff's present condition resulted from the injury he received in March, 1908."

Eleventh.

The Circuit Court of Appeals erred in holding that the Circuit Court was correct in charging the jury as follows:

"But in this connection I further say to you that, if you find from the evidence before you that the plaintiff's system was impregnated with tuberculosis germs, or that he has tuberculous germs in his system, and that those germs were brought into activity by the injury of which he complains, and that without that injury they

would not have been brought into activity and the present condition of the plaintiff would not have resulted, then you may consider the present condition of the plaintiff in estimating the amount of damage which you may believe him to be entitled to recover." This was error because if the plaintiff's system had tubercular germs in it when he received the injury, then the present condition of the plaintiff would not be the proximate result of the slight injury he received on the head in March, 1908. It would not be just to make the defendant pay damages measured on the plaintiff's present condition, when the injury he received was so comparatively slight.

12.

The Circuit Court of Appeals erred in affirming the judgment of Eight Thousand Dollars ($8000.00), rendered by the Circuit Court on the 25th day of February 1911, against the Texas & Pacific Railway Company.

Wherefore this applicant prays for a writ of error that said errors may be corrected, and prays that the judgment of the Circuit Court of Appeals of the Fifth Circuit and the judgement of the Circuit Court of the Eastern District of Texas, be reversed.

F. H. PRENDERGAST,
W. L. HALL,
Att'y- for Texas & Pac. Ry. Co.

Writ of Error allowed and supersedeas Bond fixed at $10,000.00.

DON A. PARDEE,
Circuit Judge.

Dec. 21/-911.

The foregoing has the following indorsements to-wit: No. 2213. The Texas & Pacific Railway Co., vs. W. A. Howell. Petition for Writ of Error and Assignment of Errors. Filed 21 day of December, 1911. Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Circuit Court of Appeals of the United States for the Fifth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between The Texas & Pacific Railway Company, plaintiff in error, and W. A. Howell af-irming a Judgment for Eight Thousand Dollars rendered on February 28 1911 for W. A. Howell defendant in error a manifest error hath happened, to the great damage of the said The Texas & Pacific Railway Company plaintiff in error, as by its complaint appears. We being willing that error if any hath been, should be duly corrected, and

full and speedy justice done to the parties aforesaid in his behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid with all things concerning the same, to the United States Supreme Court together with this writ, so that you have the same at Washington in not exceeding thirty days from 21st day of December 1911 being the date of issuance of the citation herein, in the United States Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said United States Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 21st day of December, in the year of our Lord one thousand nine hundred and eleven.

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

Allowed by

DON A. PARDEE,
United States Circuit Judge.

It is hereby certified that a copy of this writ is this day lodged in the Clerk's Office for the use of the defendant in error, 21st day of December 1911.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER, *Clerk.*

[Endorsed:] No. 2213. The Texas & Pacific Ry. Co. vs. W. A. Howell. Writ of Error. Filed 21st day of December A. D. 1911. Frank H. Mortimer, Clerk. By —— ——, Deputy.

Bond.

Know all men by these presents, that we, the Texas & Pacific Railway Company, as principals and R. H. Stewart and C. R. Buddy, as sureties are held and firmly bound to W. A. Howell in the full and just sum of Ten Thousand Dollars ($10,000.00), to be paid to said W. A. Howell, his certain Attorneys, Administrators, executors, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally, by these presents. Sealed with our seals and dated this 18th day of December, in the year of our Lord, 1911.

Whereas, lately at the session of the Circuit Court of Appeals for the 5th Circuit, in a suit depending in said Court between the Texas & Pacific Railway Company, plaintiff in error and W. A. Howell, Defendant in Error, a judgment was rendered against the said Texas & Pacific Railway Company, affirming a judgment of Eight Thousand Dollars ($8,000.00), rendered against said Railway by the United States Circuit Court of the Eastern Division of Texas,

at Jefferson, and the said Texas & Pacific Railway Company having obtained a writ of error and filed copy thereof in the clerk's office of the said Circuit Court of Appeals to reverse the judgment rendered in the aforesaid suit and the citation directed to the said W. A. Howell, citing and admonishing him to be and appear at the session of the Supreme Court of the United States to be holden at the city of Washington on the — day of — next.

Now the condition of the above obligation is such that if the said Texas & Pacific Railway Company, shall prosecute said writ of error to effect, and answer all damages and costs, if he fail to make it plea good, then the above obligation to be void; else remain in full force and virtue.

Witness our hands this 18th day of December, 1911.

TEXAS & PACIFIC RY. CO.,
By W. L. HALL, *Att'y.*
R. H. STEWART.
C. R. BUDDY.

Approved Dec. 21, 1911.
DON A. PARDEE,
Circuit Judge.

The foregoing has the following indorsements to-wit: No. 2213. The Texas & Pacific Ry. Co., vs. W. A. Howell. Bond. Filed 21 day of December, 1911. Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to W. A. Howell, or S. P. Jones his attorney of record, Greeting:

You are hereby cited and admonished to be and appear before the United States Supreme Court at Washington within 30 days from the date hereof, pursuant to a Writ of Error filed in the Clerk's Office of the Circuit Court of Appeals of the Fifth Circuit wherein The Texas & Pacific Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States this 21st day of December, in the year of our Lord one thousand nine hundred and eleven.

DON A. PARDEE,
Circuit Judge.

I accept service of this citation and waive further citation.
Decem- 26, 1911.

S. P. JONES,
Att'y for W. A. Howell, Defendant in Error.

[Endorsed:] No. 2213. United States Circuit Court of Appeals. The Texas & Pacific Ry. Co. vs. W. A. Howell. Citation. Issued —— —, 189–. Returned and filed 28th day of December, 1911. Frank H. Mortimer, Clerk, By —— ——, Deputy.

United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the 17 pages next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the court (except the transcript of the record from the Circuit Court of the United States for the Eastern District of Texas) in a certain cause in said court, numbered 2213, wherein The Texas and Pacific Railway Company was plaintiff in error, and W. A. Howell was Defendant in Error, as full, true and complete as the originals of the same now remain on file and of record in my office.

In testimony whereof, I hereunto *my* subscribe my name and affix the seal of said Circuit Court of Appeals, at my office in the city of New Orleans, Louisiana, in the Fifth Circuit, this 2nd day of January, A. D. 1912.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals.

Endorsed on cover: File No. 23,023. U. S. Circuit Court of Appeals, 5th Circuit. Term No. 947. The Texas & Pacific Railway Company, plaintiff in error, vs. W. A. Howell. Filed January 23d, 1912. File No. 23,023.

In the Supreme Court of the United States

OCTOBER TERM, 1911

THE TEXAS & PACIFIC RAILWAY COMPANY,
Plaintiff in Error

vs.

W. A. HOWELL,
Defendant in Error

No. 947

In Error to the United States Circuit Court of Appeals for the Fifth Circuit

BRIEF OF THE PLAINTIFF IN ERROR

The defendant in error has duly notified (by serving a copy of his motion and brief and argument) the plaintiff in error that on April 22nd, 1912, he will submit his motion to affirm or dismiss this cause. The plaintiff in error in opposition to the motion to dismiss would respectfully call

the attention of the Court to the fact that no reason or ground for dismissal is shown in the motion, nor is any attempt made in the brief and argument to justify the motion to dismiss. It is our understanding that there must be color to the motion before this Court will give it any consideration.

As to the motion to affirm "because it is manifest that the writ of error in this cause was sued out for delay only, and that the questions on which the decision of the cause depend are so frivolous as to need no further argument," the plaintiff in error denies that the writ of error was sued out for delay, but on the other hand says that it was sued out for the purpose of bringing the cause before this Court to secure the correction of an erroneous judgment and for no other purpose; and the plaintiff in error respectfully invites the attention of the Court to the presentation of the questions involved in the cause in the brief following, and submits that such questions are not frivolous, and that there is no basis or foundation for defendant in error's motion to affirm.

The plaintiff in error objects to the cause being taken up out of its regular order to the prejudice of other litigation awaiting the determination of the Court, and prays that the motions filed by defendant in error be refused.

The plaintiff in error says that the statement of the nature of this case as made by defendant in error, in his motion to affirm or dismiss on page 2, and also in his brief and argument on page 6, is not a correct and fair statement of the facts in the case, in these particulars especially, to-wit: said statement is misleading in that it fails to show that the gang of men with which Howell was connected was employed in doing one piece of work, that is, adding to, remodeling, or repairing a coal chute,

Howell being engaged in cleaning out a place for the foundation for the supporting timbers, while other members of the gang were preparing the timbers to be used, while still others were on top of the chute removing the flooring so that the timbers could be put in place. The whole gang was doing the same work, to-wit: adding to, remodeling, or repairing a coal chute, although different members of the gang were doing different parts of it. The said statement is not fair or correct in that it states that men were sent to the top of the coal chute to tear away the decking without Howell's knowledge. Howell knew that there were eighteen members of the gang; he knew the work to be done, and that others of the gang were doing other parts of the work. Howell's own testimony was to the effect that he heard the instructions issued to one of the men to get a pinch bar and top maul and go up on the chute. "Tom Brewer came along and said to Lewis, get a pinch bar and top maul and go up on the chute" Tr. 18. The undisputed testimony was that the men on the chute were tearing up the flooring and that this floor was from 10 to 14 feet above Howell. The physical facts, to say nothing of the plaintiff's own and other testimony, show that plaintiff must have known that this work was being done directly over him.

The defendant in error in his motion to dismiss or affirm at the bottom of page 2, of the printed motion makes a statement that a piece of plank fell and struck Howell on the head, making an incision and driving his head to the ground, which caused an injury to his head and the spinal column by the vertebrae being pressed together, causing an inflammation of the substances between them.

We think that this statement will become important in one branch of the case and we think it is not correct, and as we understand the evidence, Mr. Howell in his

own testimony about the middle of page 14 of the printed transcript, says: "At the time I was hurt my body was in a stooping position and I was shoveling dirt. The timber struck me on the head. I was in a position with my head on the level with my body."

We do not think it possible that with a man in a stooping position with his head on a level with his body, being struck on the head by a piece of timber falling from above, would cause an injury to his spinal column by pressing the bones together.

We call the attention of the Court to the unfairness and incorrectness of this statement of the defendant in error because it is misleading on some of the principal points involved in this appeal.

Before passing from the defendant in error's motion and brief, we desire to call the attention of the Court to the case of *Northwestern Fuel Co. vs. Danielson*, 6 U. S. C.C.A. 636, upon which defendant in error seems to rely, and the facts in which he states are similar to the facts in this case. Danielson was loading coal into cars by the side of a trestle, and had no connection with the work of tearing down the trestle. While Danielson with his foreman and fellow laborers were loading coal, another and entirely separate work, to-wit: tearing down the trestle, was undertaken by another gang under another foreman. Danielson had no part or connection with this new work.

Other cases cited by defendant in error as to the duty to provide a safe place to work, relate to fixed conditions and not to the character of work Howell was doing at the time of his injury.

STATEMENT OF THE CASE.

W. A. Howell filed suit in the District Court of Harrison County, Texas, against the Texas & Pacific Railway

Company to recover damages for alleged personal injuries received while in the employ of the railway company at Marshall, Texas, on March 3rd, 1908. The railway company, being a federal corporation, filed its petition and bond to remove the case to the United States Circuit Court for the Eastern District of Texas, and the case was accordingly removed. The cause was tried on February 25th, 1911, and verdict and judgment rendered for Howell for eight thousand ($8,000.00) dollars. The railway company sued out a writ of error and the United States Circuit Court of Appeals affirmed the judgment without any written opinion, and the railway company then brought the case to this Court by writ of error, assigning the same errors that were relied upon in the Circuit Court of Appeals.

The circumstances of plaintiff's injury were about as follows: He was employed as a bridge carpenter in a gang of some eighteen men, D. L. Woodruff being their foreman. On the 3rd of March, 1908, a squad of some five or six of these men went to repair the coal chute at Marshall, Texas. This coal chute being a structure of the ordinary kind, being an incline frame work in order that cars may run up the elevation and there put coal in pockets from which the coal is dumped on to the tender or tank of the engine. The repairing they went to do was that they were to insert an upright post, being a square timber about 8 inches in diameter to support one of the pockets above. Howell with one or two others was excavating to make a foundation for the bottom of the post. Some other of the workmen went above on the deck or floor, which was about 12 feet above the ground where Howell was working; they went up there to remove the floor in order that they might place the new post in proper posi-

tion. When these men were at work above prying loose the floor a piece slivered from a plank and fell and struck Howell on the head. The piece of plank was approximately 3 feet long, 3 to 5 inches at one end and running to a point at the other, and it was caused to fall by the workmen above loosening the floor. The direct injury to Howell's head was not very severe, but he claims that as a secondary effect tuberculosis of the spinal column set in, which entirely undermined his health. When Howell was injured on the 3rd of March, 1908, he went to the hospital and had his wounds dressed and then went to his home and he went to the hospital several days and had his wounds on his head dressed by the surgeon (Tr. 14, 15).

He had been working in the bridge gang about eight months. About four or five days after Howell was injured he came back to work and worked on with the bridge gang until March 25, 1908. He was then let out on account of a reduction in the force, and not on account of the injury. Howell then went to work for the city in laying concrete sidewalks, his work being to make openings in the concrete sidewalk. He then worked for the city as watchman for a while until about August, 1908, when he went to work for the railway company at the round house, his duty being to wipe off the engines. He was sick two or three times during the fall of 1908, and his last spell of sickness was about a month and the others a few days at a time. He quit work the latter part of December, 1908, and went to Colorado City, Texas, to his brother's, who was living on a farm there. He worked on the farm in January and February of 1909, and had Dr. Phenix and Dr. Smith treat him out there. He got unable to work in March, 1909, and moved back to his old home at Mansfield, Louisiana. In June, 1909, he had Dr. Stokes of

Mansfield to treat him, who gave him some character of electrical treatment. In August, 1909, he had Dr. Parsons of Mansfield treat him, and he treated him for about twelve months. He went to see Dr. Parsons about every week. About September, 1909, he concluded that the injury he had received on the railroad had caused his condition and he determined to file a suit.

Soon after that date his case developed into what is commcnly known as Potts' disease of the spine, called Spondylitis, which causes the spine to curve forward and the knuckles on the back to make a little protrusion. This Potts' disease finally produced running sores on his ankles and wrist and abscess in his groin, which is called Psoas abscess, sometimes called a cold abscess. It had never discharged anything from it.

The testimony of several physicians that was taken to show that Potts' disease is usually produced from some kind of traumatic injury or an injury of some kind, that the infection is not directly in the open wound, but the theory seems to be that the poison germ is encapsulated in the system, and the injury sets it free, and the germs multiply in the system and usually attack the spine.

The defendant set up in general terms two defenses, one of them was that the circumstances of the injury did not show any negligence that resulted in Howell's injury, and if there was any negligence shown, it was the negligence of the fellow servants of Howell, who was on the floor above him taking up the plank. The defendant also contended that Howell's present condition, being afflicted with Potts' disease, is too remote from the injury he received to make the company liable for his present condition.

Various exceptions were reserved to the Court's charge and to the Court's refusing certain requested instructions.

Assignment of errors being as follows:

FIRST.

The Court erred in refusing special charge No. 1, requested by the defendant, as follows:

> "The jury are charged that the evidence fails to show any negligence of the railway company that would make it liable in this case, you will therefore find a verdict for the defendant."

SECOND.

The Court erred in refusing special charge No. 2, requested by the defendant, as follows:

> "The jury are charged: The fact that Mr. Howell was injured while he was working for defendant carries with it no presumption of negligence on the part of the railway company. And it is not sufficient for the employee to show that the employer may have been guilty of negligence. The evidence must point to the fact that the railway company was negligent."

THIRD.

The Court erred in refusing special charge No. 3, requested by the defendant, as follows:

> "The jury are charged: An employee as Howell was assumes the risk of a danger of which he has

actual knowledge and of such hazards as he would have learned by the exercise of that ordinary circumspection which a prudent man would have used in the particular employment. The employee can not shut his eyes to dangers that are obvious to an ordinary man."

FOURTH.

The Court erred in refusing special charge No. 4, requested by the defendant, as follows:

"The jury are charged: That the plaintiff appears at this time to be suffering from a disease of the spine. It is claimed by the plaintiff that such disease is caused by the blow on the head inflicted at the coal chute on March 3, 1908. Before you can give damages for his present condition you must believe that the blow on the head caused the present condition, not that it may have caused it."

FIFTH.

The Court erred in refusing special charge No. 5, requested by the defendant, as follows:

"We ask the Court to charge that under the circumstances of this case it was not the duty of the defendant to furnish Howell a safe place in which to do the work he was engaged in performing at the time he was injured."

SIXTH.

The Court erred in refusing special charge No. 6, requested by the defendant, as follows:

"The defendant requested the Court to charge the jury that plaintiff can not recover if he knew the other employees were above tearing up the decking, or that by ordinary circumspection a man in his position should have known it, and in that case he can not recover."

SEVENTH.

The Court erred in refusing special charge No. 7, requested by the defendant, as follows:

"The defendant requests the Court to charge the jury that it would not be negligence in the foreman, Woodruff, to send one of the servants to the upper deck to work while Howell was working below, if the jury believe that the careful performance of the work on the upper deck would not have resulted in injury to plaintiff."

EIGHTH.

The Court erred in charging the jury as follows:

"If the jury find from a preponderance of the evidence that the defendant was guilty of negligence in sending its employees to the upper deck of the coal chute to tear up the timbers while plaintiff was engaged in excavating below, and if you find that the manner in which the coal chute was torn up was an act of negligence upon the part of the employees

of defendant, and that both acts of negligence, that is, the act of negligence in sending the employees to the upper deck to perform the services, and the manner in which it was performed by the employees, both concurred to produce the injury to plaintiff, in that case the plaintiff would also be entitled to recover."

This was error, because it is not alleged that there was any negligence on the part of the men working on the deck above Howell, and it is alleged in plaintiff's supplementary petition that the negligence of the men tearing up the decking was not the proximate cause of the injury.

NINTH.

The Court erred in charging the jury as follows:

"Upon the other hand, to state to you the con verse of the position, the duty does devolve upon the defendant to exercise ordinary care to furnish a reasonably safe place in which its employees are to work, and to exercise ordinary care to maintain the safety of that place during the progress of the work, and if you further find that the failure to exercise such ordinary care in either instance resulted in injury to the plaintiff, he would be entitled to recover."

This was error, because under the circumstances of this case Howell, being sent with others to repair a defective coal chute, the rule that he must have a safe place to work has no application.

TENTH.

The Court erred in charging the jury as follows:

"If the jury find that the present condition of the plaintiff is the direct and proximate result of the injury he sustained by being struck by the falling piece of wood, then you may take the present condition of the plaintiff into consideration in estimating the amount of his damages, but the jury will not be authorized to assume that the condition of the plaintiff at present, that is, the Potts' disease or tuberculosis of the spine, was produced by the injury which he received through the lick on his head by the falling piece of timber."

This was error because the evidence was not sufficient in law to show that plaintiff's present condition resulted from the injury he received in March, 1908.

ELEVENTH

The Court erred in charging the jury as follows:

"But in this connection I further say to you that, if you find from the evidence before you that the plaintiff's system was impregnated with tuberculous germs, or that he had tuberculous germs in his system, and that those germs were brought into activity by the injury of which he complains, and that without that injury they would not have been brought into activity and the present condition of plaintiff would not have resulted, then you may consider the present condition of the plaintiff in estimating the amount of damage which you may believe him to be entitled to recover."

This was error, because if the plaintiff's system had tubercular germs in it when he received the injury, then the present condition of the plaintiff would not be the proximate result of the slight injury he received on the head in March, 1908. It would not be just to make the defendant pay damages measured on the plaintiff's present condition, when the injury he received was so comparatively slight.

FIRST

The defendant says that the plaintiff failed to make out a case of negligence on the part of the defendant and the jury should have been so instructed.

This portion of the evidence raising a question as to whether the defendant was entitled to peremptory instruction is practically without contradiction. There was a coal chute at Marshall, which is an inclined trestle work, on which is placed a railroad track in order that cars loaded with coal may be put up on top and the coal then loaded in pockets to be dumped on to the engines. One of the upright posts that supported the pockets had become decayed or for some reason it became necessary to insert a new post.

Dave Woodruff, the bridge foreman, and a squad of men under him, went to make these repairs and put in the new post. An employee, Harper, and others were busy sawing the post and shaping it to be put in place. Howell, the plaintiff, and some one or two others were engaged in digging away the dirt to place a solid foundation for the bottom of the post. Cully and other laborers had gone on to the deck above where Howell was working to take up the floor of the upper deck so that the post could be readily placed in its proper place. The evidence

is not clear whether Woodruff, the foreman, instructed Cully to go on the upper deck or not, but the evidence is clear that it was a part of the work that was necessary to be performed by somebody. While Cully was removing the floor a piece of plank slivered off from the flooring and fell striking Howell on the head below, a distance of about 12 feet from where Cully was working. Howell must have known that the men were at work above him as he testified as follows:

"Mr. Tom Brewer came along and said to Lewis, get a pinch bar and top maul and go up on the chute" (Tr. 18).

Furthermore the undisputed testimony shows that the flooring which was being pried loose with pinch bars was only about 12 feet above Howell (Howell's testimony (Tr. p. 18), and Howell was directly under it (Tr. 43).

Dave Woodruff, the foreman, testified while plaintiff was doing the work below, "I sent Cully up with some men to get the length of the uprights and clear away the decking to place a new pocket and while the men were up there a piece of timber fell and struck plaintiff" (Tr. 45.)

The Court instructed the jury that the men taking up the decking above were fellow servants with Howell. The Court using this language in his charge.

"If the jury should conclude from the evidence that the plaintiff was injured, and that his injury was caused by the negligence of those employees of the defendant engaged in tearing away the timbers from the upper deck of the coal chute, then the plaintiff would not be entitled to recover. The reason of that is the fact that one servant is not authorized to recover for the negligence of his fellow servants and the Court informs you here, as a matter of law, that the employees of the defendant who were engaged in tearing away the timbers from the upper

deck of the coal chute were fellow servants of the plaintiff, and for their negligence, under the law, he is not entitled to recover."

Now it seems clear that if the negligence of those laborers on the upper deck would not create a cause of action, that surely there was no other negligence that could create a cause of action in this case. All these men were sent there to perform one piece of work, each squad of them doing separate parts of the work, and the negligence of one servant doing one piece of work injured his fellow servant. It seems clear that there was no liability, unless it arose from some other branch of the case. Another branch of the case presented by the Court was that defendant company owed to the plaintiff, Howell, a safe place to work. The language of the Court being:

"Upon the other hand, to state to you the converse of the position, the duty does devolve upon the defendant to exercise ordinary care to furnish a reasonable safe place in which its employees are to work, and to exercise ordinary care to maintain the safety of that place during the progress of the work, and if you find in this case that the defendant failed either to exercise ordinary care to provide a safe place in which plaintiff was to work, or failed to exercise ordinary care to maintain the safety of that place during the progress of the work, and if you further find that the failure to exercise such ordinary care in either instance resulted in injury to the plaintiff, he would be entitled to recover."

We submit that this presents a false issue and an improper test as to the liability of the defendant. As an abstract proposition of law the statement in the charge is correct, but it is well recognized by the authorities that there are certain exceptions to the "safe place" rule, and

it is manifest that the rule did not apply to the facts in this case. The rule applies to fixed conditions, and not to conditions that are constantly changing as the work progresses. This is recognized in cases where the work is of construction or demolition or repair. Men that use a bridge to pass over a stream are entitled to a safe bridge, but men that are sent to repair a bridge can not demand that the bridge should be safe when they go to repair it. Another illustration, a lot of laborers are building a house. It can not be said that the employer must personally see that one laborer does not drop a piece of timber on another, or that he does not leave lying around a board with a nail in it, which is almost exactly the present case. The Court tells the jury that the company sent a lot of men to repair a coal chute. The laborers were required to do exactly what was done, and there is no evidence showing that any improper thing was done. As applied to the case at bar, it would mean that while Howell was fixing the foundation for the bottom of the post no person should be at work above him; that that would be wrong; that the company must see that while Howell is working his fellow servants must not work at any place above him. The result of such a rule would be that only one man could work at a time.

The other ground presented by the Court and which is the main ground relied on in plaintiff's petition, is that Woodruff, the foreman, was guilty of negligence in sending the men to the upper deck while Howell was working below.

The language of the Court in its charge being:

"In this case the plaintiff's right to recover if at all depends on the proof by a preponderance of the evidence that the defendant was guilty of an act of negligence in

sending its employees to tear away and remove the upper deck of the coal chute while the plaintiff was engaged in excavating a place for a foundation underneath the coal chute. That is the act of negligence charged in the plaintiff's petition, and that must be the act of negligence which he must prove by a preponderance of the evidence in order to entitle him to recover."

The Court again presented the question in this language:

"If the jury find from a preponderance of the evidence that plaintiff's injuries were caused by the negligence of defendant in sending its employees to tear up the upper deck of the coal chute while plaintiff was excavating below, and that act of the defendant was negligence which produced the injury complained of, then plaintiff can recover."

After these charges were given by the Court the defendant requested the charge set out in the seventh assigned error, as follows:

"The defendant requests the Court to charge the jury that it would not be negligence in the foreman, Woodruff, to send one of the servants to the upper deck to work while Howell was working below, if the jury believe that the careful performance of the work on the upper deck would not have resulted in injury to plaintiff."

And we couple this charge with the charge set out in our first assigned error, which was in effect peremptory instruction for the jury to find for the defendant.

Bishop's Non-Contract Law, Sec. 649, discussing the duty of railways as to low bridges, says: "But where a railroad bridge was in process of repair and by reason of it a train was stopped at an unusual place on the bridge and a brakeman fell through it, the road was held not

liable; and plainly in such a case the temporary imperfections incident to a repair are not within the general rule." Citing *Koatz vs. Chicago R. R.*, 65 Iowa, 224.

Again; the only theory on which this judgment can be sustained is that the defendant was negligent in having men pry up the flooring on the upper deck while Howell was at work below. In other words, that the defendant was negligent in its method or plan of doing the work of repairing or remodeling the coal chute. It cannot be said in this character of case that the mere happening of the accident raised a presumption of negligence. There is no liability in the case unless the railway company was negligent, and the burden was on plaintiff to show negligence. The facts are undisputed that while Howell was doing the work below and his fellow-servants were doing the work above, a piece of plank slivered off and fell and struck Howell. Can the mere happening of this unexpected result, to-wit: the splitting off of a comparatively small piece of plank, be said to condemn the method or plan of the work, without further evidence? If there was no negligence shown on the part of the defendant, the plaintiff assumed the risk and the consequences. *Patton vs. T. & P. Ry.*, 179 U.S. 658.

The case of *H. & T. C. Ry. vs. Alexander*, 132 S. W. 119, was decided by the Supreme Court of Texas since the enactment of the Assumed Risk Statute, which is quoted by defendant in error in his brief, supporting his motion to affirm or dismiss. Alexander slipped and fell from a locomotive by reason of stepping on a greasy tool box, and was killed. The Court was unable to see any foundation in the evidence for a finding of negligence. It is said in the opinion in that case: "It is true that this Court has never adopted that theory of the duty of

the employer to his employees, which concedes to him the legal right to organize and conduct his business in his own way, however regardless it may be of their safety, if he will only let them know of the dangers to which he exposes them and obtain their consent to incur them. That the doctrines of assumed risk and contributory negligence have often precluded them from complaining does not entirely preclude the operation of the principle to which this Court has always adhered that the law imposes on employers the duty, in planning and pursuing their businesses, to exercise ordinary care with regard to the safety of the employees, and what we say of the facts of this case is said in full recognition of that principle. But what is the standard by which the question whether or not that care has been exercised is to be determined but the conduct of prudent and careful men in the business under investigation? And when the evidence not only fails to show a departure from the line of conduct pursued by such men, but shows affirmatively complete conformity to it, how can the conclusion of negligence be drawn. Whatever the experience of jurors may enable them to know of affairs of some kinds, it is certainly not true that they can be held to know how such a business as that here in question should be conducted better than all the employers and employees engaged in it. With only such evidence in the case, no issue is presented for a jury to pass upon."

SECOND.

The rule requiring a railroad company to furnish a safe place for their employees to work has no application to a case where laborers are sent to repair a defective structure such as a coal chute.

In this case the bridgemen under Foreman Woodruff went to repair a coal chute in the City of Marshall; the repairing to be done was that they were to put in a new upright post, and to do the work it became necessary to excavate in the ground for the base of the post and to tear up the flooring on the upper deck of the chute, about 12 feet above the ground, and in doing the work a plank was split and a portion of it fell on Howell on the ground below. The defendant requested the Court to charge the jury as follows:

"We ask the Court to charge that under the circumstances of this case it was not the duty of the defendant to furnish Howell a safe place in which to do the work he was engaged in performing at the time he was injured." Presented in our fifth assigned error.

The Court charged the jury: "That the duty does devolve upon the defendant to exercise ordinary care to furnish a reasonably safe place in which its employees are to work and to exercise care to maintain the safety of that place during the progress of the work."

And then told them plaintiff could recover if defendant had failed in that regard (Tr. 49).

Howell alleged that "he was working under a foreman who was engaged in the work of adding to, remodeling or repairing" the coal chute (Tr. 6). The testimony showed that Howell and the others with whom he was working were engaged in this work. Howell was clearing a place for the timber to rest on the ground (Tr. 14). The men above him were loosening the flooring so that the timber could be placed (Tr. 45). The very work that Howell and his fellow servants were doing was the changing of the conditions that existed at the place where the work was being performed.

"The rule that it is the duty of a master to exercise ordinary care to provide a reasonably safe place * * * for his servants is held not applicable to cases in which the very work which the servants are employed to do is of such a nature that its progress is constantly changing the conditions as regards an increase or diminution of safety. The hazards thus arising as the work proceeded are regarded as being the ordinary dangers of the employment, and, by his acceptance of the employment, the servant necessarily assumes them." Labatt on Master and Servant, Sec. 269.

This general exception to the "safe place" rule is abundantly sustained by the authorities. "It was not the master's duty to follow up the servants every movement to see that they made the place safe": *Schneider vs. Quartz Co.*, 220 Pa. 548, 69 Atl. 1035. "Manifestly the safe place rule was not applicable to a case in which the place became dangerous during the progress of the work, either necessarily or from the manner in which the work was done." *C. C. C. & St. L. Ry. vs. Brown*, 20 C.C.A. 147; 73 Fed. 970. See also, *American Bridge Co. vs. Seeds*, 75 C.C.A. 407; 144 Fed. 605; *Fortin vs. Manville Co.*, 128 Fed. 642; *Montgomery vs. Robertson*, 229 Ill. 466, 82 N.E. 396; *Bedford Quarries Co. vs. Bough*, 80 N.E. 529.

In *Mehan vs. Railway*, 90 S.W. 119, a member of a construction gang engaged in bolting angle irons on the ends of rails was injured by a rail flying up and striking his hand as the construction train passed over a tie that was a little higher than the others. It was held that he assumed the risk; that the duty of a master to furnish a servant a reasonably safe place to work applied with all its rigor only where the place and its conditions had some

permanency and were unshifting. It did not apply where the place was undergoing a change by the very work the servants were performing:

G. C. & S. F. Ry. vs. Jackson, 65 Fed. 48;
Moore vs. Railway, 31 Atl. 734.

The safe place rule does not apply in construction work on buildings: *Richardson vs. Provision Co.*, 72 Ill. App. 77; *McNeil vs. Bottsford-Dickinson Co.*, 112 N. Y. Supp. 867; nor in the demolition of a building: *Clark vs. Liston*, 54 Ill. App. 578.

Kreigh vs. Westinghouse, 152 Fed. 120.

A master is not liable for injury to a servant caused by the falling of a truss upon him while at work in the construction of a building, on the theory that the master has failed to furnish him a safe place to work:

McElwaine-Richards Co. vs. Wall, 166 Ind. 267; 75 N.E. 408.

In *Armour vs. Hahn*, 111 U. S. 313, where a carpenter fell by reason of stepping upon a loose board, this Court denied a recovery on the ground that if the timber was insecure, it was so either by reason of the risks ordinarily incident to the state of things in the unfinished condition of the building or else by reason of the negligence of one the carpenters or brick layers all of whom were employed or paid by the same master, and who were working in the course of their employment at the same place and time with an immediate common object, the erection of the building.

Armour vs. Hahn has been approved and followed in *Texas Armour & Co. vs. Dumas*, 95 S.W. 710. The facts

in *Allen vs. Ry. Co.* (Texas) 37 S. W. 171, were somewhat similar to those in *Armour vs. Hahn.*

The exception to the rule was applied in *Walton vs. Hotel Co.*, 160 Pa. 3; 28 Atl. 438, where a floor fell upon a carpenter; in *Clancy vs. Constr. Co.*, 50 N. Y. Supp. 800, where a servant was knocked from a beam by an elevator; in *Walaszewski vs. Schokneeht* 120 Wis. 376; 106 N. W. 1070, where a servant was injured by a falling plank.

Mr. Bailey, in his work on "Personal Injuries Relating to Master and Servant," Vol. 2, in discussing the duty requiring the Master to furnish a safe place, in Sec. 2993 says:

"The rule has no application to premises made unsafe by the negligent manner in which fellow servants are performing their work."

And in Sec. 3001 he says:

"The rule was not applied where an employee was injured by the negligent manner in which another employee attempted to take down an old building."

And in Sec. 2996 he makes the following observation:

"It was said that the negligent use by an employee of perfect working machinery will seldom be adjudged a breach of the master's duty of providing a safe place for his employees. Such a construction would make any negligent misplacement of a switch, any collision of trains, even any negligent dropping of tools about a factory a breach of duty providing as a safe place. The true idea is that the place and instruments in themselves must be safe, for this is what the masters' duty fairly compels, and not that the master must see that the negligent handling by an employee of the machinery shall not create danger."

And in Sec. 3022 he says where a piece of property is out of repair:

"The men who are employed in making it safe take upon themselves whatever of added risk comes from the existing condition of the place of the work."

And in Dresser's Employers' Liability, page 535, he makes the following observation.

"It is a most undoubted principle that, where a piece of property is out of repair, the men who are employed in making it safe take upon themselves whatever added risk comes from the existing condition of the place or the work."

In the case of *Moon-Anchor Gold Mines vs. Hopkins*, 111 Fed. Rep. 303, Judge Adams of the Eighth Circuit makes the following statement in a case where excavations were being made and there was a caving in of the dirt:

"In *Finalyson vs. Milling Co.*, 14 C. C. A. 492, 67 Fed. 507, this Court had under consideration a similar question. That was a case where a miner was killed by a mass of earth falling upon him. This Court, by Judge Sanborn, there said: 'It is the general rule that it is the duty of the master to exercise ordinary care to provide a reasonably safe place in which the servant may perform his service. * * * * * But this rule can not be justly applied to cases in which the very work the servants are employed to do consists in making a dangerous place safe, or in constantly changing the character of the place for safety as the work progresses. The duty of the master does not extend to keeping such a place safe at every moment of the time as the work progresses. The servant assumes the ordinary risks and dangers of his employment that are known to him, and those that might be known to him by the exercise of ordinary care and foresight. When he

engages in the work of making a place that is known to be dangerous safe, or in a work that in its progress necessarily changes the character for safety of the place in which it is performed as the work progresses, the hazard of the dangerous place and the increased hazard of the place made dangerous by the work are the ordinary and well known dangers of such place, and by his acceptance of the employment the servant necessarily assumes them.'

"This Court also, by an opinion delivered by Judge Thayer in the case of *Railway vs. Jackson*, 12 C. C. A. 507; 65 Fed. 48, after enunciating the general rule of duty of a master to provide a reasonably safe place for his servants to work, says:

" 'It frequently happens that men are employed to tear down buildings or other structures, or to repair them after they have become insecure, or it may be that the work undertaken by the employee is of a kind that is calculated to render the premises or place of performance for the time being, to some extent insecure.' 'In cases such as these the servant undoubtedly assumes the increased hazard growing out of the defective or insecure condition of the place where he is required to exercise his calling, and the doctrine above stated can not be properly applied.'

"In the case of *Railway Co. vs. Brown*, 20 C. C. A. 147; 73 Fed. 970, in the Circuit Court of Appeals for the Seventh Circuit, a similar case was under consideration. It is there said:

" 'There is a duty on the part of a master to provide his servants a safe place in which to work, but manifestly that principle is not applicable to a case like this, where the place becomes dangerous in the progress of the work, either necessarily or from the manner in which the work is done.'

"The foregoing decisions demonstrate that the measure of duty and obligation of a master to his servant, when the work voluntarily undertaken by the servant consists in making a dangerous place safe, is materially changed from that prevailing under the general rule."

In the case of *Southern Ry. Co. vs. Lyons*, 169 Fed. Rep. 560, Judge Burns of this circuit in discussing a case where a servant was sent to take to the shops an engine that had been in a wreck, made the following statement:

"The proposition that the employee engaged in making the necessary repairs, or engaged in moving a broken car or engine in order that the same may be repaired, assumes the ordinary risk of danger incident thereto, has abundant support."

Citing *Railroad vs. Mayo*, 14th Tex. Civ. App. 253.
Railway vs. O' Hare, 64th Tex. 603.

Watson vs. Railway, 85 Tex. 438, and a number of other cases.

In the case of *Florence Railroad vs. Whipps*, 138 Fed. Rep. 13, the employees of a railroad went at night to remove obstructions from the railroad casued by a landslide. Whipps was killed by a rock, which fell down the mountain into the cut. The Court below charged the jury to the effect that the railroad company owed the injured servant the duty of providing a safe place for Whipps to work. The Court of Appeals of the Eighth Circuit held that such a charge was erroneous, the Judge making this observation: "The circumstances give the servant no right to assume that a safe place was prepared and furnished or any inspection had, other than such examination as had been or might be made by fellow servants in prosecuting the work."

THIRD

The plaintiff, Howell, assumed the risk of planks falling from the floor above on to him, if he knew the other servants were at work tearing up the floor over him.

The facts show that a lot of bridgemen went to repair the coal chute. The plaintiff testified that Mr. Woodruff was the foreman of a gang of about eighteen men and Mr. Brewer and Jackson were scratch bosses (Tr. 14).

"Mr. Tom Brewer came along and said to Lewis to get a pinch bar and top maul and go up on the chute. I do not know whether any of Woodruff's men were above him or not" (Tr. 18).

In our sixth assigned error we show that we requested the Court to charge the jury that plaintiff can not recover if he knew the other employees were above tearing up the decking, or that by ordinary circumspection a man in his position would have known it, and in that case he can not recover. The Court refused this instruction and did not give any instruction to the jury as to the rights of the parties in case the plaintiff knew that Cully and others were above tearing up the flooring. Indeed, it is hardly probable that Howell did not know that the other men were directly above him tearing up the flooring. The other men were prying loose the flooring within about 12 feet or less of Howell (Tr. 18).

Howell, of course, knew the work to be done there; he knew they were to put in an upright post and that his part of the work was to dig out the foundation. Howell testifies as follows: "Mr. Woodruff put me under there and told me to frame the hole in the ground in which to set the timber" (Tr. 14).

Jno. W. Harper testified for plaintiff as follows: "At the time plaintiff was hurt I was north of the coal chute

framing some timbers; plaintiff was digging with a shovel under the coal chute. Tom Cully was on top of the coal chute and was above Mr. Howell. He had some three or four men up there with him. They were tearing off the decking or flooring of the chute and in doing this work they were using a pinch bar and claw bars" (Tr. 40-41).

Mr. Henry Harper testified for plaintiff as follows: "That he did not notice the piece of timber when it struck Howell; it was pointed out to me afterwards. It was a fresh split piece of timber; the men were tearing up the floor of the coal chute; the men had to go on top to repair the coal chute" (Tr. 42.)

L. H. Harper testified for plaintiff: "That the floor we were taking up had been put down there to walk on and we could not put the pocket we wanted there without removing a portion of the floor. Some of the men, I presume, were immediately over plaintiff" (Tr. 43).

So the evidence was clearly sufficient to prove the fact that Howell must have known that the men were tearing up the floor directly over him. He must have known that it was necessary to tear up the floor to insert the new post, and it seems clear that the law would place upon Howell the risk of working directly under the men above, if he knew they were at work above him. The Court, however, declined to give any instruction on this branch of the case and the jury were not informed what special risks Howell took, if he knew the men were at work above him.

FOURTH.

It was not negligent to send men up on to the staging of the coal chute if it be true that no harm would result if the men above carefully performed their work.

The circumstances of the case have been heretofore stated. The defendant requested the Court to charge the jury: "That it would not be negligence in the foreman, Woodruff, to send one of the servants to the upper decking to work while Howell was working below. If the jury believe that the careful performance of the work on the upper deck would not have resulted in injury to plaintiff." The Court refused this instruction and gave no instruction covering this particular point, except this, the Court charged the jury that if Woodruff was negligent in sending the men above to work while Howell was working below, and this negligence caused injury to Howell, the defendant would be liable, or if Woodruff was negligent in sending the men above to work and the man was negligent in performing his work above, which concurred with Woodruff's negligence to produce the injury, then the defendant would be liable. He further instructed the jury that if Woodruff was not negligent, but the injury was produced solely by the negligence of the man on the floor above, the defendant would not be liable. We sought by the special instruction requested to explain to the jury under what circumstances the act of Woodruff would be free from fault, that is, we desired to have the jury told that it would not be negligence in Woodruff to send the man on the floor above to work if careful performance of the work above would not have resulted in injury, but the Court declined this instruction.

Woodruff was sent there as a representative of the master to direct the manner of performing the work and it would be an anomally to allow the jury to say as they have done in this case, that Woodruff would not be permitted to send one man above to work while he had a man working below, and that he would not be allowed to do

this even if the jury believe that no harm would have resulted if the man working above had been careful. If negligence and consequent liability can be predicted upon such acts, then the contractor who builds a house would be liable if one workman threw a shingle from the roof, or carelessly allowed a shingle to fall from the roof and strike a man below.

It seems that Cully was the man sent to work on the upper deck of the coal chute. There is no pleading or evidence that Cully was a negligent servant, therefore Woodruff had a right to believe that Cully would perform the work on the upper deck properly and with care; and if he so believed he certainly ought not to be blamed for carrying on the work in that manner.

Woodruff, the foreman, sent the men up on the chute to remove the plank, and while they were prying up the 2 x 12 plank the piece slivered off and fell (Tr. 45).

Plaintiff's witness, Henry Harper, swore: "It was a fresh split piece of timber" (Tr. 42). Can it be said that Woodruff was negligent in sending these men up there to remove the plank, in that he should have anticipated that this piece would sliver off and fall? If the fact that the piece of plank slivered off and fell can be attributed to any negligence whatever, it must be attributed to the negligence of the men who were prying off the plank.

The Court had told the jury that Cully's negligence within itself would not create a liability, and to refuse the charge requested it seems to me was to tell the jury that Woodruff, the foreman, had no right to expect that Cully would perform his duties in a careful manner, for if it is true that Woodruff could presume that Cully would act in a careful manner, and if it is true that if Cully had been careful no harm would have resulted to Howell, then there is no basis for a recovery.

FIFTH.

The Potts' disease of the spine with which the plaintiff is now suffering is too remote a consequence to be chargable against the defendant as the result of the injury he received.

The plaintiff was injured on the 3rd of March, 1908. He went to the hospital for four or five days and then went back to work and worked there three or four weeks with the bridge gang. He then worked for the city in various capacities for about three months, and about August, 1908, he went to work for the railroad company at the round house and worked along to December, 1908. He had several spells of sickness during the fall of 1908. He then went out in West Texas and worked on a farm until March, 1909, being in bad health. He then returned to his old home in Mansfield, Louisiana. He had a physician in West Texas in January and February, but neither of them detected the Potts' disease. After returning to Mansfield he had Dr. Stokes about June, 1909. Dr. Stokes gave him some kind of electrical treatment. Dr. Stokes died and he next saw Dr. Parsons of Mansfield; first saw in July, 1909. He testified as follows.

"He then complained of his back hurting him. Have been his physician since that time. I have watched the progress of his disease. The third visit I made to him, which was six weeks after the first visit, I discovered the curvature in his spine. It was very small at that time. His trouble is what is known among physicians as Potts' disease or tuberculosis of the spine. It takes its name from the first physician who first accurately described the condition. It is known as one of the surgical diseases.

The plaintiff's disease since he first came under my observation has been progressive, gradually growing worse. I have seen the plaintiff once or twice a month every month since I first discovered the knuckle in his back, and while I could not give definitely the time in which the various changes in the size of the deformity have taken place, still I could say that about every four months I could detect that it was getting worse, and that the place gradually involved more of the vertebrae or separate pieces of the backbone, until at the present time it seems to involve several of the pieces of the backbone. I think it was in the spring of last year that I first detected an enlargement in his groin, what we doctors call a psosas abscess. It takes its name from the location and the direction that the abscess follows down the psosas muscle, and it is nearly always distinguished by some collection of pus. That abscess has acquired quite a large size. I should say it has a pint or more of blood matter in it; that would be my estimate. At the same time, the general health of Mr. Howell has been fairly satisfactory, but I take it that the change in the plan of his living is responsible for that. He has adopted an outdoor life and sleeps out doors,which has a good effect on his general condition, but no effect on the general condition of the local disease in his backbone. About the latter part of August or the 1st of September Mr. Howell had a slight hemorrhage from his lungs, and within a couple of weeks after that he began to cough up pieces of bone. Now, that bone was evidently thrown off from the disease of the back, and the bones had worked through the pleural cavity, and through the lung, and was coughed out through the bronchial tube. He has occasionally from that time coughed up pieces of bone. The psosas abscess has its origin, in my judgment, from the

tubercular disease of the backbone. It forms at the diseased part of the backbone and traces down to the groin. That is a usual condition in Potts' disease of the spine; in trouble of that character an abscess will usually form in the groin. Traumatism, as we call it, is the most frequent cause of the start of the disease, and by that I mean some physical injury. Taking the plaintiff's case as I have heard it detailed on the stand, and the history of his family, father, mother, brothers and sisters, and the history as given of his own individual family and of his own personal life, and the fact that he was injured as he has described by receiving the blow on his head sufficient to knock him down, and that the pains in his back have continued since the time of his injury, I believe the blow he received on the head is the cause and start of the trouble from which he is now suffering. I believe there must be three or more of the joints of the backbone now involved. Tuberculosis of the spine is a germ disease. The germ is apt to attack any part of the body. It seems to me that the blow to the plaintiff's head could have produced his condition from the fact that the backbone is jointed continuously with the skull, and the force of the blow, was transmitted down the vertrebral column from the head. The backbone is articulated closely with the skull, and the force of the blow would be transmitted down the back. The force of the blow could be carried down the bony substance of the back. In other words, if you hit one end of a stick the force or jar of the blow would be felt at the other end. The force I speak of would be when he was standing up and was struck on top of the head, and the same jar would be produced to his spinal column. If he was stooping over with his body inclined and his head as low as his back there might have been transmitted to his spine some force. You may inflict

a blow on the body and it may produce effects at once, and, on the other hand, the effects may come some time afterwards. You may strike one side of the head and injure the other side. When a blow is inflicted and an injury or bad condition sets up at another place some time afterwards, there must be some injury at the time of the blow, but the results may not be apparent for some time. Spondylitis is Potts' disease of the spine, and it refers to an anterior or posterior curvature of the spine. It is only another name for Potts' disease of the spine. As to whether Potts' disease could be produced by an injury, unless the tubercular bacillus was in the system at the time of the infliction of the injury is a question in my mind. The bone could have come from the stomach from something he had eaten, but I do not believe it was bone he had swallowed. The psosas abscess is a cold abscess. I do not think that abscess ought to be opened. It is easy enough to open them, but if you want to stop them from running, you can not do it. I believe if it was opened the whole tract would become infected with other germs and his general condition would be worse than it is at present. I believe to open it up would have a more deleterious influence on his health than to leave the psosas abscess as it is. The fact that there is no inflammation leads to the conclusion that it is not deleterious."

Dr. Terhune testified: "That the authorities give 53 per cent of cases of Potts' disease as being caused by traumatism or injury. I attribute his present condition to the injury he received because I do not know of anything else that could have caused it. I can only trace the condition back to the injury because of the absence of anything else to produce it" (Tr. 26).

Dr. J. A. Moore testified: "That he was the chief surgeon in defendant's hospital; that he saw plaintiff's wound when it was dressed. My recollection is that the wound healed without any trouble. Potts' disease is usually produced from some source inside of the body. It is nearly always secondary to some other point of infection in the body; there must be some other disease to bring it out. Taking the history of plaintiff's case, I do not believe the injury could have produced Potts' disease unless he had tubercular germs in his system at the time of its infliction. If he did have tubercular germs in his system at the time he was hurt, it is possible that his present condition would be due to the injury. It is not usual for Potts' disease to develop so long after an injury but it is possible. Potts' disease usually develops from ten to twelve months after the injury. I never read where a patient suffering from Potts' disease coughed up bones" (Tr. 27-28).

Dr. Reuss, Dr. J. W. Embree and Dr. S. E. Milliken testified substantially the same, that in their opinion Howell's present condition originated from the blow or jar directly upon or transmitted to the spine at a time when there existed in his system a tubercular tendency. I do not think the cut on the head would have produced his condition. It took a blow on the spine or a transmitted blow on the spine. Howell should have been treated as follows: He should have perfect rest of the spinal column for the purpose of keeping these involved areas separated, or from coming together, and thus producing absorption of the inflammation which has been produced. If it had not been stopped it would have been very much ameliorated, or the probabilities of the psosas abscess delevoping would have been prevented (Tr. 35). The support he

has on now to support his back is wholly inadequate. Dr. Reuss gave it as his opinion that Howell's condition was caused by the injury. Dr. Milliken gave it as his opinion that the injury could not have resulted in his present condition without there having been present at the time the tuberculous germs. Dr. Milliken answers that the injury did not cause the present condition unless the germs were in his system (Tr. 38-39).

This is substantially all the evidence introduced to show that Howell's present condition was caused by the injury. It is not contended by the plaintiff in error that Howell is not now afflicted with Potts' disease of the spine, that is admitted. We have a year and five months after the injury before the Potts' disease is discovered by the attending physician. Our contention on this branch of the case is, first, that the present condition is too long in point of time to be charged up in a legal point of view as a result of the injury. He is shown to have been in bad health all the time from March, 1908, to July, 1909, before the Potts' disease was developed.

Dr. Moore testifies that the disease was developed quicker in a person of low vitality than in a person of strong vitality (Tr. 28)..

We also contend that the railroad company should not be held responsible for the entire diseased condition of the plaintiff, which was not the natural or proper result of the injury he received. The fact even that we may believe that in truth on this particular occasion his present condition did result from the injury should not be sufficient, because it is not natural and it is not probable that a slight cut on the head in March, 1908, from which injury he lost only a few days from his labor, would result in an incurable Potts' disease in July, 1909. The idea for

which we contend is expressed in Railway and Other Accidents by Allan McLain Hamilton on page 257 as follows:

"All forms of accident aboulia recover in time, provided the psychopathic inherited state of the individual is not too deeply seated, and in such cases it seems hardly fair that the defendant who may be responsible for a trifling shock or injury should be punished or mulcted when more than two-thirds of the contributing condition is due to some congenital neurotic vice of organization or to previous bad habits, not always easily ascertainable. In many of these cases some other cause might have developed the particular condition had there been no accident. In a few the state is intractable, particularly if the surrounding influence be especially bad and conducive."

He also says:

"Considerable medico-legal importance must be attached to head injuries, where, as a result of infection conveyed from without, abscess, thrombosis of the sinuses, meningitis, or general inflammation of the brain substance may ensue. Following such paths of infection as the lymph vessels and membranous prolongations which communicate with the various intracranial serous cavities we find that through the introduction of the various cocci, secondary and grave disturbances may be a consequence of trauma. Not only may pyogenic microorganisms lead to the development of the disease enumerated, but the tubercle bacillus may find its way into the body or be stirred into activity in subjects in whom it has remained latent or has infected other parts.

"Case XXIII. The case of a boy about eight years of age, who showed brain symptoms eleven days after a

fall is reported by Schilling. In this subject fracture of the inner table of the skull with irritation by fragments of bone was supposed to exist, but the patient died before an operation could be performed. After death tuberculous meningitis was found, and it is to be supposed that the encapsulated and latent bacilli were mobilized by the trauma and set free in the circulation at the point of injury. (McDill.)

"As a rule, the infection follows the introduction of material at the point of fracture or site of the external wound; but occasionally the claim has been made that intracranial inflammation has been due to metastatic extension from a distant point."

We admit that the case of *Crane Elevator Co. vs. Tippert*, 63 Fed. Rep. is somewhat against us. In that case a boy was injured on the 12th of September by the falling on a piece of iron injuring his arm. On November 19th he went to the hospital and stayed in bed in the hospital about a month and carried his arm in a sling until Christmas. The testimony tended to show that when admitted to the hospital he was suffering from tubercular osteomyelitic resulting from the presence of micro or tuberculous germs in his system. That if these micro or germs had not been present in his system the fall and consequent bruises would not have resulted in the serious injury from which he suffered.

On appeal the Court said:

"It was contended that the injury sustained by the defendant in error was not the proximate result of his fall, but arose from the presence of tuberculous germs in his system. It was the hurt occasioned by the fall which

afforded an opportunity for the active development of the poisonous germs which had heretofore been innocuous. It was the wrongful act which gave rise to the consequent injury, and it is not apparent that the injury would have occurred in the absence of such cause."

In that case only about two months intervened between the hurt and the developed disease.

It seems to me that it is unjust and illogical for the Court to lay down a rule of law that one man with diseased germs in his body can recover more than another man without such germs, when the two men have received precisely the same wrongful treatment at the hands of the other party. It seems to me that so far as possible the rules of law should mete out the same damages to each of two persons if those persons received the same treatment. If the nature of one man's injury should cause different result from another's, then they should not receive the same amount of compensation, but to adjudge that a man had tuberculous germs in his system and should be allowed to recover more damages than a normal man, who has no such germs, seems illogical. Of course, this implies that the man's condition is not known to the person doing the hurt. When we consider the duty a common carrier owed to a passenger, it is the duty that is due the average passenger or the passenger in his normal condition and no higher duty rests on the carrier to a diseased man in the absence of information that the passenger is in a position or situation to demand different attentions.

On this last point our contention is not that Potts' disease may not in some cases be such a direct result of an injury as to be the basis of a recovery, but we say in

this case the result is too remote from the injury and too many circumstances have intervened to allow us to look to his present condition.

We believe at common law death must ensue in one year from the injury to make the injury the legal cause of the death.

We pray the judgment be reversed.

W. L. HALL,
Attorney for Texas & Pacific Railway Co.
Plaintiff in Error,
Dallas, Texas.

MAR 29 1912
JAMES H. McKENNEY

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

TEXAS & PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

W. A. HOWELL,
Defendant in Error.

No. 947.

MOTION TO AFFIRM AND DISMISS, AND BRIEF AND ARGUMENT OF DEFENDANT IN ERROR ON MOTION TO AFFIRM OR DISMISS.

S. P. Jones,
Attorney for Defendant in Error.
Marshall, Texas.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

TEXAS & PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
W. A. HOWELL,
Defendant in Error.
} No. 947.

MOTION TO AFFIRM OR DISMISS FILED BY THE DEFENDANT IN ERROR.

Now comes W. A. Howell, defendant in error, by S. P. Jones, his attorney, appearing in that behalf, and moves the court to affirm or dismiss the above entitled cause under subdivision 5 and 6 of rule 6, because it is manifest that the writ of error in this cause was sued out for delay only, and that the questions on which the decision of the cause depend are so frivolous as to not need further argument.

STATEMENT OF THE NATURE AND RESULT OF THE CAUSE

W. A. Howell recovered judgment against the Texas & Pacific Railway Company in the United States Circuit Court for the Eastern District of Texas for eight thousand dollars for personal injuries received while in the employ of the railway company, by reason of its negligence.

The cause was affirmed by the United States Circuit Court of Appeals for the Fifth Circuit.

In March, 1908, while in the employ of the Texas & Pacific Railway Company under D. L. Woodruff, general foreman, and while the railway company was building an addition to the coal chute at Marshall, the general foreman commanded Howell to make an excavation for the purpose of placing upright posts or supports for the coal chute pockets. While Howell was engaged in this work, and without his knowledge, the foreman sent a number of men under a sub-forman or straw boss to the top of the coal chute with instructions to tear the decking away from the same with pinch bars and claw bars, which work had to be performed directly over Howell.

While the decking was being removed with pinch bars an irregular piece of one of the planks was split off in being pried loose and fell, striking Howell on the head making an incision and driving his head to the ground, which caused an injury to his head and to his spinal column by the vertebrae being pressed together

causing an inflammation of the cartilaginous substance between them.

This injury to the back developed into a typical case of Potts disease of the spine, which the testimony showed, and the jury found, was caused and resulted from the injury in that at the time of the injury Howell had in his system in a latent, encapsuled and innocuous condition tubercular bacilli which were harmless but were excited into activity by reason of the injury, and attacked the vertebrae and destroyed the same, totally incapacitating Howell from labor for all time, and greatly shortening his life; thereby damaging him to the amount awarded by the jury.

The trial court fairly and fully presented the case to the jury in a lengthy charge and limited Howell's right to recovery in the following manner:

First: That W. A. Howell could not recover damages unless the jury should find by a preponderance of the evidence that D. L. Woodruff, the vice-principal of the Texas & Pacific Railway Company, was guilty of negligence in sending the men to tear the decking away from the coal chute directly over Howell while Howell was engrossed in the work that he had been commanded to perform by the said vice-principal, and that such negligence was the direct and proximate cause of the injury to Howell.

2d. That if the injury was inflicted by reason of the negligence of the railway company, that the jury

should not award damages for the present condition of Howell (Potts disease of the spine) unless the jury should find from a preponderance of the evidence that the said disease was directly caused by and directly resulted from the injury that was inflicted upon Howell, and that the germs would not have been excited into activity, and that the disease would not have appeared but for the injury inflicted upon him.

The said defendant in error, by his attorney aforesaid, presents with this motion to affirm or dismiss a printed brief and argument in support thereof, which is hereto annexed.

Wherefore the defendant in error prays that the said cause be affirmed or dismissed; or that if the motion to affirm or dismiss is not granted, that the cause be transferred for hearing to a summary docket and disposed of.

S. P. JONES,
Attorney for Defendant in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

TEXAS & PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
W. A. HOWELL,
Defendant in Error.
No. 947.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR ON MOTION TO AFFIRM OR DISMISS.

STATEMENT OF NATURE AND RESULT OF CAUSE OF ACTION IN THE TRIAL AND CIRCUIT COURT OF APPEALS.

W. A. Howell recovered judgment against the Texas & Pacific Railway Company in the United States Circuit Court for the Eastern District of Texas for eight thousand dollars for damages for personal injuries received by W. A. Howell while in the employ of the Texas & Pacific Railway Company, by

reason of the negligence of the railway company. The case was carried to the United States Circuit Court of Appeals by the railway company and the judgment of the trial court was by that court affirmed.

W. A. Howell was, in March, 1908, in the employ of the Texas & Pacific Railway Company at Marshall, Texas, as a member of a large bridge gang of which D. L. Woodruff was general foreman. On the morning of March 3d, the foreman was building an addition to the coal chute at Marshall and directed W. A. Howell to make an excavation for the purpose of placing or building upright posts or supports for the coal chute pockets (which were to be placed at an elevation in which to store coal to be dumped into the engines).

While Howell was engaged in this work and without his knowledge, the foreman sent a number of men under a sub-foreman or straw boss, to the top of the coal chute with instructions to tear the decking away from the same, which work had to be performed directly over Howell. While the decking was being removed an irregular shaped piece of one of the planks was split off in being pried loose and fell, striking W. A. Howell on the head while he was in stooped position, making the excavation, making an incision and driving his head to the ground, which caused an injury to his spinal column by reason of the concussion.

The wound on the head healed readily, but the injury to his back developed into a typical case of "Potts disease of the spine," which all of the physicians who examined W. A. Howell agreed was the probable effect and result of the injury to the head; that Potts disease of the spine was caused by reason of there being tubercular bacilli present at the time that W. A. Howell was injured in a latent or encapsuled state which were harmless and would have probably never given him any trouble but the injury causing a compression of the cartilaginous substance between the vertebrae caused an inflammation to set up and furnished a favorable "nest" or "seat" for attack by the bacilli, and caused them to be excited into activity which resulted in the attack by them of the vertebrae and the destruction thereof. That the injury thus inflicted absolutely incapacitated W. A. Howell for labor and has greatly shortened his life and he has been damaged to the amount of the verdict given by the jury.

In a lengthy charge the trial court submitted the case to the jury upon the following theories:

1st: That W. A. Howell could not recover damages unless the jury should find by a preponderance of the evidence that D. L. Woodruff, the vice-principal of the Texas & Pacific Railway Company, was guilty of negligence in sending the men to tear the decking away from the coal chute directly over Howell while Howell was engrossed in the work that he had been commanded to perform by the said vice-

principal, and that such negligence was the direct and proximate cause of the injury to Howell.

2d: That if the injury was inflicted by reason of the negligence of the railway company, that the jury should not award damages for the present condition of Howell (Potts disease of the spine) unless the jury should find from a preponderance of the evidence that the said disease was directly caused and directly resulted from the injury that was inflicted upon Howell, and that the germs would not have been excited into activity, and that the disease would not have appeared but for the injury inflicted upon him.

Plaintiff in error has filed eleven assignments of error which were also urged in the United States Circuit Court of Appeals, and which in varying forms, raised the following issues:

1st: That the trial court should have directed a verdict in favor of the railway company.

2d: That if Howell knew the men were working over him, tearing up the decking, or by ordinary circumspection a man in his position should have known it, that he could not recover.

3d: That the trial court should have held as a matter of law that the railway company was not liable in damages for the "Potts disease" or tuberculosis of the spine which resulted from the injury.

There are various assignments of error but all

of the points made by them were fully covered by the charge of the court except the three propositions above stated.

The defendant in error in this brief will answer the propositions insisted upon by the plaintiff in error in the order in which they are given.

FIRST.

The trial court did not err in refusing to direct a verdict in favor of the railway company, in that the evidence was sufficient to justify the jury in finding that the railway company was guilty of negligence which was the proximate and direct cause of the injury to W. A. Howell.

Statement.

See preliminary statement in this brief.

Authorities.

Baltimore & Ohio Ry. Co. vs. Baugh, 149 U. S. 386;
Mather vs. Rillston, 156 U. S. 398;
T. & P. Ry. Co. vs. Archibald, 170 U. S. 672;
Choctaw, Oklahoma & Gulf Ry. vs. McDade, 191 U. S. 68;
Northern Pacific Ry. vs. Babcock, 154 U. S. 190;
Northwestern Fuel Co. vs. Danielson, 6 U. S. C. C. A. 636;
Chicago Housewrecking Co. vs. Birney, 54 U. S. C. C. A. 458;

National Steel Co. vs. Lowe, 62 U. S. C. C. A. 229;
Thompson on Negligence, Vol. 4, Sec. 3809-3814;
Shearman & Redfield Vol. 1, Sec. 194;
Shearman & Redfield on Negligence, Vol. 1, Sec. 185 b.

Remarks.

The railway company was actively present in the persons of D. L. Woodruff, the general foreman, and Tom Cully, the straw boss. The general foreman directed the particular manner in which the particular work was to be done, and commanded W. A. Howell to perform the particular labor that he was performing when he was injured. Howell was absorbed in his work in a stooped position making an excavation with no opportunity to see what was going on or being done above him, and with full knowledge that Howell was absorbed in the identical labor that the master had commanded him to perform, the master, without his knowledge and without warning, sent a squad of men directly above his head with instructions to pry off planks and timbers that formed the decking or flooring of the coal chute, and which work, in the very nature of things, was fraught with danger to the men working underneath.

In the performance of this work which was being done under the commands and directions of Woodruff and Cully, who were not the fellow servants of

Howell, a piece of timber was pried off that fell and inflicted upon Howell the injury for which he sued.

In *Mather vs. Rillston,* 156 U. S. 398, it is said:

> "All occupations producing articles or works of necessity, utility, or convenience may undoubtedly be carried out and competent persons familiar with the business and having sufficient skill therein, may properly be employed upon them, but in such cases where the occupation is attended with danger to life, body, or limb, it is incumbent on the promoters thereof and the employers of others thereon to take all reasonable and needed precaution to secure safety to the persons engaged in their prosecution, and for any negligence in this respect from which injury follows to the persons engaged, the promoters or the employers may be held responsible and mulcted to the extent of the injury inflicted."

In *Texas & Pacific Railway Company vs. Archibald,* 170 U. S. 672, it is said:

> "The employer on the one hand may rely on the fact that his employee assumes the risks usually incident to the employment. The employee on the other hand has the right to rest on the assumption that the appliances furnished are free from defects discoverable by proper inspection and are not subjected to the dangers of using appliances with such defects, etc. * * * The employee is not compelled to pass judgment upon the employer's methods of business or to conclude as to their adequacy, but has the right to assume that the employer will use reasonable care to make the appliances safe and to deal with those furnished relying on this fact."

The same doctrine applies with reference to a place to work and obeying the instructions of the master. The same general rule is announced in *Choctaw Oklahoma & Gulf Railway vs. McDade,* 191 U. S. 68 and in *Northern Pacific Railroad vs. Babcock,* 154 U. S. 190, and in Shearman & Redfield on Negligence, Sec. 185b, where it is laid down as a general rule that the servant has the right to assume that the master has discharged and will continue to discharge the duty of exercising ordinary care to furnish a reasonably safe place and to use the same care to keep the same in a reasonably safe condition for the servant to discharge his duties.

SECOND.

It is complained that the trial court erred in failing to give the following charge:

> "The plaintiff Howell assumed the risk of planks falling from the floor above him if he knew that the other servants were at working tearing up the floor over him."

Proposition of Defendant in Error.

Defendant in error submits that this is not a correct proposition of law but that to have charged Howell with assuming this character of risk, it would be necessary to show that Howell knew that the men were tearing up the decking over him and that the manner of tearing the same up was dangerous to the extent

that an ordinarily prudent man would not have remained in the service.

Statement.

Howell testified that he did not know that the men were working above him (Transcript 18). There was no evidence to show that Howell knew that the men were removing the planks from the floor over him. The trial judge instructed the jury that Howell, in accepting employment, assumed the risks which were ordinarily incident to that employment, but did not assume risks that were the result of the negligence of the railway company; and that if Howell was injured by reason of one of the risks ordinarily incident to the employment, that he could not recover (Transcript 51, bottom page and 52, top of page).

Authorities.

Northwestern Fuel Co. vs. Danielson, 6 C. C. A. 636;
Mather vs. Rillston, 156 U. S. 398;
Choctaw Oklahoma & Gulf Ry. vs. McDade, 191 U. S. 68;
Shearman & Redfield on Negligence, Sec. 185b;
Chicago Housewrecking Co. vs. Birney, 54 C. C. A. 458;
Also Texas Assumed Risk statute. General Laws of the 29th Legislature 1905, page 386.

Remarks.

There was not sufficient evidence to have justi-

fied the jury in finding that Howell knew that there were men above him tearing up the decking immediately over him while he was excavating a place to erect the upright timbers. If he had known that the men were at work above him, he had the right to assume that the master would not direct or permit them to engage in work that would result in injury to him. It was the duty of the master to exercise ordinary care to furnish him a reasonably safe place in which to perform his work, and to exercise ordinary care not to subject him to dangers while engaged in such work; and he had the right to assume that the master had discharged that duty and that the master would continue to keep the place reasonably safe during the time he was required to continue the work.

The Texas Assumed Risk Statute in force at the time Howell was injured (see acts of 29th Legislature, 1905 page 386) is as follows:

Section 1. That in any suit against a person, corporation or receiver operating a railroad or street railway for damages for the death or personal injury of an employe or servant, caused by the wrong or negligence of such person, corporation or receiver, that the plea of assumed risk of the deceased or injured employe where the ground of the plea is knowledge or means of knowledge of the defect and danger which caused the injury or death shall not be available in the following cases:

First. Where such employee had an opportunity before being injured or killed to inform the employer or a superior entrusted by the employer with the authority to remedy or cause to be remedied the defect, and does notify or cause to be notified the employer or superior thereof within a reasonable time, provided it shall not be necessary to give such information where the employer or such superior thereof already knows of the defect.

Second. Where a person of ordinary care would have continued in the service with the knowledge of the defect and danger and in such case it shall not be necessary that the servant or employe give notice of the defect as provided in sub-division 1 hereof.

The case of *Northwestern Fuel Company vs. Danielson,* 6 U. S. C. C. A. 636, in which the facts are similar to those in the Howell case, holds directly that a person working under a trestle-work does not assume the risk of injury from the acts of servants that are afterwards directed to perform service on the trestle-work above him.

THIRD.

It is contended by plaintiff in error that the trial court should not have authorized the jury under any finding of fact to compensate Howell for the injury and suffering brought about by reason of the development of "Potts disease of the spine."

The defendant in error submits as a counter proposition that inasmuch as the evidence showed that "Potts disease of the spine" was caused and produced by the injury, that the plaintiff in error is liable in damages to the defendant in error for the injuries thereby sustained.

Statement.

The uncontroverted evidence fully justified the jury in finding that "Potts disease" and the diseased condition of the defendant in error was the direct result of the injury that he received by reason of the negligence of the plaintiff in error.

The trial court only authorized a recovery for the injury and suffering brought about by "Potts disease" in the event that the jury should find that the same was the direct and proximate result of the injury. See transcript, page 53.

Authorities.

M. & St. P. Railway Co. vs. Kellogg, 94 U. S. 469;
Travelers Insurance Co. of Hartford vs. Melich, 65 Fed. 178, 12 C. C. A. 544;
Crane Elevator Co. vs. Lippert, 63 Fed. 942, 11 C. C. A. 521;
Vol. 13 Cyc. page 30-31;
Vol. 15 Century Digest Title Damages Sec. 41-42-43;
H. & T. C. Ry. vs. Leslie, 57 Tex. 83.

In the *M. & St. P. Railway Co. vs. Kellogg,* it is said:

> "The question always is, was there an unbroken connection between the wrongful act and the injury, a continuous operation. * * * When there is no intermediate, efficient cause, the original wrong must be considered as reaching to the effect and proximate to it. The inquiry must therefore always be whether there was any intermediate cause disconnected from the primary fault and self-operating, which produced the injury."

In the case of *Crane Elevator Co. vs. Lippert,* a boy had tubercular bacilli or microbes in his system and fell and received some bruises on the arm, which afterwards developed into tuberculosis of the bone of the arm. The physicians all agreed that if he had not had the microbes or germs in his system that the fall and consequent bruises would not have resulted in the serious injury from which he suffered. The court said, "the plaintiff in error further contended on the oral argument that the injuries sustained by the defendant in error was not the proximate result of his fall, but arose from the presence of tubercular germs in his system. It was the hurt, occasioned by the fall, which afforded an opportunity for the active development of the poisonous germs which had theretofore been innocuous. It was the wrongful acts which gave rise to the consequent injury, and it is not apparent that the injury would have occurred in the absence of such cause."

In cases of personal injuries, the party inflicting the injury must respond in damages for all of the injuries that result from his wrong, and is not relieved by reason of the fact that he might not have anticipated the extent of the injury that would result from his wrong. The test is has the diseased condition been brought about as a proximate result of the injury inflicted. If so, recovery can be had. It is not material whether the wrong doer intended to inflict the injury or anticipated the enormous result that might grow from the infliction of an apparently small injury. No such favors are indulged in his behalf, but he must pay the full penalty consequent upon his wrongful act.

Argument.

The case was fairly and fully submitted to the jury in the charge of the trial court, and the evidence fully and completely sustained the verdict returned by the jury. And the judgment of the trial court and the circuit court of appeals correctly dispose of the case.

In addition to the matters specially presented in this brief, the plaintiff in error raises the following questions which are without any merit whatever.

The seventh assignment of error is based upon a charge requested to the effect that if the work above Howell could have been performed without injury to him that it was not negligence for Woodruff to direct its performance.

This phase of the case was fully covered by the charge of the trial court that made Howell's right to recover depend upon the acts of Woodruff in sending the men above him constituting culpable negligence; and the further direction that if this constituted culpable negligence and the employees above were also negligent, and the combined negligence caused injury to Howell, that he could recover upon the familiar doctrine that the negligence of the master combined with the negligence of the fellow servant causing an injury authorizes a recovery.

The charge referred to also covers the eighth assignment of error of plaintiff in error which complains that the court erred in authorizing Howell to recover for the combined negligence of the master and a fellow servant.

In the ninth assignment of error, the plaintiff in error asserts that the railway company did not owe Howell the duty of exercising ordinary care to furnish him a reasonably safe place in which to work because it claims that the plaintiff in error was engaged in making repairs, and that Howell assumed the risk of injury while engaged in repair work.

The rule contended for is not applicable to the facts in this case, and is not correctly stated in the assignment of error.

A person engaged in repair work assumes the risks incident to the repair work; but does not as-

sume risks that appear by reason of the negligent manner in which the work is done or by reason of the negligent acts of the employer.

Howell was not injured by reason of some portion of the structure that he was working upon giving way, but by reason of the negligent manner in which the master carried on the particular work.

The men were not engaged in repairing a defective coal chute or structure, but in making additions thereto. While the master does not owe the duty of furnishing a safe building that is out of repair and that is to be made safe by repairs, the master always owes the duty of refraining from sending his servant into a place of manifest danger or peril; or making the place where the servant is commanded to perform his work, dangerous thereafter while the work is being performed.

The master in all cases and under all circumstances owes the servant the duty of exercising that ordinary care that a reasonably prudent person would exercise under the exigencies of the particular situation. The command of the master to do the work in a particular manner, or to engage in work at a particular place, is acceptable by the servant as a guarantee that the master has discharged his duty of seeing to it that the servant is not to be exposed to unnecessary risks. See Shearman & Redfield on Negligence, Sec. 185b.

If under some circumstances the master is to be excused where he sends employes above a man's head to tear up flooring and decking with pinch bars and claw bars, there should certainly be no presumption indulged in favor of excusing the master of such apparently heartless and inhuman conduct; but the master should be required, before being excused, to show that the exigencies of the particular situation made it absolutely necessary for the master to thus expose the servant, situated as Howell was situated, to risks and dangers that were in no sense connected with or incident to the work that the master had commanded him to perform.

I submit that the judgment should be, in all things affirmed.

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